REPORTS

OF

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN THE

NINETEENTH, TWENTIETH, AND TWENTY-FIRST
YEARS OF THE REIGN OF GEORGE III.

BY

The Right Hon. SYLVESTER DOUGLAS,
BARON GLENBERVIE.

FOURTH EDITION, WITH ADDITIONS

BY

WILLIAM FRERE,
SERJEANT AT LAW.

VOL. II.

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*Equidem cum colligo argumenta causarum, non tam ea numerare soleo,
quam expendere.* CICERO.

London:
PRINTED FOR REED AND HUNTER, LAW BOOKSELLERS,
BELL YARD, LINCOLN'S INN.

1813.

Brooke, Printer, Paternoster-Row, London.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE TWENTIETH YEAR OF THE REIGN OF GEORGE III.

1780.

Tuesday, 23d May.

STRACY and Another, Assignees of BISHOP, a Bankrupt, *against* HULSE and Others.

If a candle-maker, being in arrear for the single duties, becomes a bankrupt, and is convicted after the assignment of his effects; the double duties are a lien upon the candles, utensils, and materials, in the hands of his assignees; and they may be distrained.

THIS was an action of trespass against *Hulse* and *Benyon*, two justices of the peace, and *Barthrop* an excise-officer. It was tried at the last assizes for the county of *Essex*, before ASHHURST, *Justice*, when a verdict was found for the plaintiffs, with £59. 6s. 4d. damages, subject to the opinion of the court, on a case which stated as follows:

A commission of bankrupt was issued against *Bishop*, (who was a candle-maker) on the 4th of *February*, 1779, and his estate assigned to the plaintiffs on the 17th of that month; the act of bankruptcy having been committed on the 29th of *January* preceding. On the 4th of *March*, an information was exhibited against him, before the defendants *Hulse* and *Benyon*, for not paying £29. 13s. 2d. the *single* duties then due and payable, for candles made by him, between the 9th of *November* and the 23d of *December*, 1778. On the same day on which the information was exhibited, he was served with a summons to attend the justices on the 6th of *March*, which he

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did; and then acknowledged, that the single duties were due, and unpaid; whereupon they convicted him in the penalty of double duties, amounting to £59. 6s. 4d.; and issued their warrant to the defendant *Barthrop*, and another excise-officer, "authorising and commanding them, and every "of them, that upon all the *candles*, and all the *materials* "and *utensils* for making of candles, in the custody of *Bishop*, "*or any person or persons in trust for him*, they should levy "the sum of £59. 6s. 4d. recovered against him, for a cer- "tain offence committed by him against the laws and "statutes of excise, whereof he stood convicted;" then directing a sale, if they should not be redeemed within six days; and if there should be any overplus, to render it to *Bishop*. By virtue of this warrant, the officers distrained the goods in the declaration mentioned, (being *candles, materials, and utensils*,) which were before, and at the time of, the distress, in the possession of the plaintiffs, as assignees. When *Bishop* appeared before the justices, he informed them, that he was a bankrupt, and could not pay the duty; and that his effects had been assigned, under the commission, to the plaintiffs. After the distress, the plaintiffs tendered the single duties to *Barthrop*, which he refused to accept.

The question was, "Whether the said goods were liable to "be distrained for the said *double* duties under the circum- "stances of this case?"

There were two arguments; the first in *Easter* term last, on *Friday*, the 21st of *April*, by *Mingay*, for the plaintiffs, and *Erskine*, for the defendants; the other this day, by *Morgan*, for the plaintiffs. *Peckham* was for the defendants, but the court thought it unnecessary to hear him.

The question turned upon the construction of certain clauses in the statutes of 12 *Car*. 2. *c*. 24. 15 *Car*. 2. *c*. 11. and 8 *Anne*, *c*. 9.

By 12 *Car*. 2. *c*. 24. § 45. the justices are authorised and required to issue warrants for levying the forfeitures, penalties, and fines, imposed by that act, (which relates to the excise on beer and other liquors,) *on the goods and chattels of the offender*; and to cause sale to be made of the said goods and chattels, (if not redeemed within a limited time) rendering to the party the overplus, if any be.

By 15 *Car*. 2. *c*. 11. § 13. all the brewing vessels, and utensils for brewing, into whose hands soever they shall come, and by what conveyance or title soever they shall be claimed,

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shall be liable and subject to, and are thereby charged with, all the debts and duties of excise, in arrear, and owing by any person or persons, for any beer or ale made within the said brewhouse; (that is, the brewer's common and usual brewhouse (a);) and shall also be subject to all penalties and forfeitures

(a) § 1.

feitures incurred by such person or persons, so using the said brewhouse, for any offence against the laws and statutes of excise; and it shall be lawful, in all cases, to levy debts and penalties, and use such proceedings against the utensils therein contained, as it might be lawful to do, in case the debtor or offender using the utensils, had been truly and really the owner and proprietor of the same.

By 8 *Anne*, c. 9. (made perpetual by 9 *Anne*, c. 21. § 7.) the excise on candles was introduced; and by § 9. of that act, all makers of candles, who shall refuse or neglect to pay the duties, are to forfeit double the sum.

The same statute, § 19. enacts, that all the *candles, and all the materials and utensils* for the making of candles, in the custody of any maker or makers of candles, or of any person or persons, to the use of, or in trust for, such maker or makers of candles, shall be liable and subject to, and are thereby made chargeable with, all the debts and duties, for candles, in arrear, and owing by such maker or makers, for any candles by him, her, or them, or in his or their working house, or places aforesaid, (enumerated § 6.) made, and shall also be subject to all penalties and forfeitures incurred by such person or persons so using such work-house, or other place, for any offence against this act, relating to the said duties upon candles; and that it shall and may be lawful, in all such cases, to levy debts and penalties, and use such proceedings, as may lawfully be done by this act, in case the debtor or offender were the true and lawful owner of the same.

And, by § 27, it is enacted, "That all and every the "powers, authorities, directions, rules, methods, penalties, "forfeitures, clauses, matters, and things, which in and by "12 *Car.* 2. *c.* 24. *or by any other law now in force,* "*relating to the revenue of excise* upon beer, ale, or other "liquors, are provided, settled or established, for managing, "raising, levying, collecting, regulating, or recovering, ad-"judging, or ascertaining the duties thereby granted, or any "of them, (*other than in such cases, for which other pe-"nalties and provisions are made and prescribed by this* "*act,*) shall be exercised, practised, applied, used, and put [414] "in execution in and for the managing, levying, collecting, "mitigating, recovering, and paying the said duties upon "candles hereby granted, as fully and effectually, to all in-"tents and purposes, as if all and every the said powers, "&c. were particularly repeated, and again enacted in the "body of this act."

After the first argument, BULLER, *Justice*, observed, that it was clear the action would not lie against the *justices*, because the warrant followed the words of the act of parliament; and therefore, if the goods distrained were not liable,

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the officers had acted without any authority. The rest of the court seemed to be of the same opinion, and the counsel for the plaintiffs gave the case up as to the defendants *Hulse* and *Benyon*.

But, with regard to the legality of the distress, they insisted, that, as the assignment had been made before the conviction, the goods were no longer in the custody of the maker, nor of any body in trust for him, but in the hands of the assignees as trustees for the creditors; and, therefore, they were not liable to be distrained under the 19th section of 8 *Anne*, *c.* 9. This section differed, they said, materially, from 15 *Car.* 2. *c.* 11. § 13. which subjects brewing utensils to the duties and penalties *into whose hands soever, or by whatever title, they should come.* There might be a good reason for the difference between the two provisions. By 15 *Car.* 2. the beer and materials are not made liable; and, as to the brewing utensils, they are of a bulky nature, and of great value, not liable to be often sold or transferred; and, therefore, purchasers might be expected to enquire what liens there are upon them; whereas candles, and materials for candles, are the daily subjects of sale; and it would be highly inconvenient, if they could be followed for the duties and penalties into the hands of third persons. If the law were so, no person could safely purchase candles, or any thing employed in making them, in open shops. The 27th section of the statute of Queen *Anne* did, indeed, extend all the penalties and modes of recovery mentioned in former excise laws to the case of candles; but, by the exception in the same section, this was only to be in cases for which no penalties or provisions were enacted by the statute of Queen *Anne* itself; and the present was a case where a new provision was made by that act; the candles and materials being thereby rendered liable, which beer, or the materials for brewing, are not by the act of 15 *Car.* 2.

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The 19th section of the act of Queen *Anne*, only meant to give the King the same remedy *by distress* for the duties and penalties, as he had at common law, or under the statute of 33 *Hen.* 8. *c.* 39. by a writ of extent; and as an extent does not, in the case of bankruptcies, attach on the goods, if issued after the assignment, nor, in the case of actions, if after judgment; (which last point was settled in the late case of *Uppom* v. *Somner* in the *Common Pleas* (a);) so here

(a) *C. B. H. & E.* 19. *Geo.* 3. 2 *Blackst.* 1251. 1294. [F]

[F] This case was reconsidered at great length in that of *Rorke* v. *Dayrell*, 4 *T. R.* 402, and the doctrine here cited from it was fully established

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here the assignment being previous to the conviction and warrant of distress, the goods were not liable. Indeed the very clause in the warrant, directing the overplus to be paid to *Bishop*, showed, that this distress could not be justified; for how could he be entitled to the overplus of goods not his property, but vested in the assignees to be distributed among his creditors?

On the part of the defendants, the law with regard to extents was admitted to be as stated; but it was said, that it could not affect this question, which depended on the words of the excise acts; and that there was no substantial difference between the two clauses of 15 *Car.* 2. *c.* 11. and 8 *Anne*, *c.* 9; or, if there was, the general provision in § 27. of the act of Queen *Anne*, extended every remedy given by the one to cases under the other. That the general policy of all the excise laws, is to give a lien upon the subject-matter of the duty, and the utensils employed; and with regard to malt, (the first act concerning which was 12 *Will.* 3. *c.* 5.) it had been decided by the court of *Exchequer* in two different cases, *viz.* the *Attorney General* v. *Senior*, and *Rex* v. *Fowler*, that, though there has been an assignment under a commission of bankrupt, it continues liable in the hands of the assignees.

Lord MANSFIELD,—This case, by admission, gives up a great part of the argument we have heard; for it admits, that the goods in the hands of the assignees were liable to the *single* duties. We think the question depends entirely on the 19th section of the act of Queen *Anne*; and it is clear, by that section, if the goods distrained were liable to the single duty, that they also were to double duty. The question therefore is, whether the *assignees* do not, by privity, stand in the place of the bankrupt as to all the rest of the world. They are his representatives. Every equity that would affect him, they are liable to. If he has pledged, they must redeem. They cannot have the wife's *chose in action*, without making a provision for her. The case of *third persons*, who have bought [416] candles, is very different. The warrant does not reach them. This is not a new question. It has been repeatedly determined in the Exchequer, that as to this sort of lien, the assignees and

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ed. Nevertheless the authority of both cases has been since expressly overruled in a case of the *King* v. *Wells and Allnutt*, which was many years pending in the Exchequer: And the law upon the subject now remains unsettled among these conflicting decisions; the same point having arisen in a case of *Thurston* v. *Mills*, which was argued in the King's Bench, Michaelmas, 50th G. 3. upon a special case, and is now ordered to be reargued on a special verdict.

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and the bankrupt are the same. The cases of *the Attorney General* v. *Senior* (1), and *Rex* v. *Fowler* (2), are in point.

The *Postea* to be delivered to the defendants.

(1) That was an information, in the Court of *Exchequer*, in 1739, by the *Attorney General*, (Sir *Dudley Ryder*,) against *Senior*, a bankrupt, and his two assignees; which set forth, that *Senior*, (being a maltster,) between *June* 1737, and the *May* before the filing the information, made malt for sale, for which a duty of sixpence a bushel ought to have been paid; and that, in *January* 1737, a commission of bankruptcy issued against him; that, at the time of his bankruptcy, he was indebted in divers sums for duties on malt, and was possessed of several quantities of malt, for which no duties had been paid; that the assignees had disposed of that malt, part of which had been charged with the duty by the officer, and part not; and that the duty for the same was still owing; that the assignees had been applied to for payment, and had neglected to pay, and refused to discover the quantity they had possessed themselves of; and praying a discovery of the quantity of malt the bankrupt was possessed of at the time of the bankruptcy, and whether the same was then charged with the duty, and how much malt came to their hands for which no duty had been paid, and how much the duties amounted to, and that they might pay the same to the King's use.

The bankrupt, by his answer, admitted, that at the time of his bankruptcy he was indebted for malt duties £93. and was then possessed of 724 bushels of malt, which was surveyed and charged with the duty, but no part thereof paid. The assignees said, that an assignment was made to them on the 24th of *January*; that they possessed and sold 724 bushels of malt, the duty on which amounted to £18. 12*s*.; that they had no notice of the debt due to the Crown, until after they had sold the malt; that, afterwards, they had notice, but refused to pay, not thinking themselves liable; that, by the bankruptcy and assignment, they were advised the property of the plaintiff's effects was divested from him, and legally vested in them, without notice of the King's debt, and before any step was taken on his behalf to affect the property, or render the bankrupt's effects liable to the demands of the Crown.

The *Attorney General* replied; and, on hearing him, and the *Solicitor General*, for the Crown, and Mr. *Booth*, and Mr. *Wilbraham*, for the defendant, it was referred to the Deputy Remembrancer, to examine, and report to the court, wha quantity of malt had come to the hands of the assignees which belonged to the bankrupt, and to take an account of the value thereof, and likewise of what money was in arrear from, and due and unpaid to his Majesty by, the bankrupt, for the duties on the said malt; or on any other, and what, quantity of malt made by him at the time when the assignees took possession of the malt belonging to him—all just allowances to be made—the cause to continue in the paper till the report.

On this order the assignees submitted, and paid the duty, and no farther proceedings were had.

(2) The case of *Rex* v. *Fowler* came on in 1779. On the 19th of *May*, 1778, a commission of bankrupt issued against *Fowler*, who was that day found a bankrupt, and a provisional assignment executed to the messenger, On the 20th of *May* an extent issued against

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against him, upon an inquisition taken that morning, for above £2300 due for malt duties, directed to the sheriff of *Suffolk*, who, by virtue thereof, entered on the bankrupt's premises, and seized upwards of the value of £2300. The assignees applied to the solicitor of the *Exchequer*, and to the sheriff to withdraw the extent, and deliver up the malt. This not being done, they presented a memorial to the commissioners, requesting that the money [417] arising from the sale of the malt might be paid over to them, the malt having been sold by the sheriff under a writ of *Venditioni exponas*, which had issued on the return of the extent. Upon this a rule was made by the court of *Exchequer*, on the motion of Mr. *Kenyon*, that the *Attorney General* should shew cause, why the assignees should not be at liberty to enter their claim of property to the malt, notwithstanding the time for so doing was expired; and to plead to the writ of extent; the money in the mean time to remain in the sheriff's hands.

The *Attorney General* did not mean to shew cause; so that the assignees would have pleaded, and the matter have come before a jury; but none of the facts being disputed, it was agreed, that the *Attorney General* should bring on the question on the validity of the extent, in the form of shewing cause.

The counsel for the assignees relied on the effect of the assignment under the commission of bankruptcy, and the change of property. They admitted, that they were liable for the duties on the malt of which they possessed themselves; but, as to the other duties in arrear, they contended they were not liable. They relied also on the difference in the words of 15 *Car.* 2. c. 11. § 13. with respect to the excise on beer, by which it is enacted, "That all and every "the brewing utensils, into whose "hands soever they shall come, and by "what conveyance or title they shall "be claimed, &c." and those of 13 *Wil.* 3. c. 5. § 18. (the first statute imposing a duty on malt,) which were not, they said, of so extensive an import.

For the Crown, the case of *Rex* v. *Senior*, and several other determinations of the same sort, were cited: And

The court determined, that the extent was legal; and that the malt in the hands of the assignees was liable to all the duties in arrear; and the rule was discharged.

The 18th section of 13 *Wil.* 3. c. 5. (the provisions of which act have been renewed annually since 1 *Anne*, *st.* 2. c. 3.) is as follows: "All malt in the "custody of any maker of malt, shall "be liable and subject to, and are "hereby made chargeable with, all "and singular the debts and duties of "malt in arrear, and owing by any "person or persons for any malt made "by such maltster, or within his malt-"house; and shall also be subject to "all penalties and forfeitures incurred "by such person or persons so using "such malthouse, for any offence "against the laws relating to the du-"ties on malt; and it shall be lawful "in all cases to levy debts and penal-"ties, and use such proceedings against "such malt as it may be lawful to do "in case the debtor or offender were "the true and real owner of the same "malt."—The 17th section is in the same words, *mutatis mutandis*, with the 27th section of 8 *Anne*, c. 9.

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Tuesday, 30th May.

BURNELL *against* MARTIN.

A party having a mortgage and also a bond, as a security for the same debt, may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure.

MOTION, by *G. Wilson*, for a rule to shew cause, why the defendant should not be discharged out of custody on filing common bail, upon an affidavit, stating, That, having borrowed £300 of the plaintiff, he had given him by way of security, a mortgage of a term for forty-five years of an estate let at £40 a year, and also a bond; that, the interest being in arrear, the plaintiff had filed a bill of foreclosure, had soon after got into possession of the estate, and had served the defendant with a *subpœna* to hear judgment as on the 29th of *May;* after which service he had arrested him in an action on the bond in this court; and that the mortgaged premises were an ample security for the debt. Lord MANSFIELD said, the motion could not be complied with, for that it had been settled over and over again, that a person, in such a case, is at liberty to pursue all his remedies at once; and the rule was refused.

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Wednesday, 31st May.

The KING *against* the Inhabitants of FRAMPTON on SEVERN.

A certificated person having returned to the certifying parish, and remained there 18 years, a son who was born to him there, during that time, being hired and serving a year in the parish certified to, gains a settlement by such hiring and service.

TWO justices removed the wife and child of *Samuel Minett*, (he having left them,) from *Frampton* to *Tretherne*. On an appeal to the quarter-sessions for *Gloucestershire*, the order of removal was quashed, by an order now removed into this court, which stated as follows:—In the year 1751, the parish of *Tretherne* granted a certificate to the parish of *Frampton* on *Severn*, acknowledging *Job Minett*, and *Ann* his wife, to be settled in *Tretherne*, under which certificate they lived in *Frampton* till the latter end of 1753, or the beginning of 1754, when they voluntarily returned to *Tretherne*, and had afterwards a son, named *Samuel*, born there. *Job Minett*, the father, continued to live in *Tretherne*, for 17 or 18 years; when,

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[F] This case has been confirmed by two subsequent decisions, *R.* v. *Newington*, 4 *T. R.* 354, and *R.* v. *Saint Michael's*, *Coventry*, 5 *T. R.* 526. In which the principle is declared to be, that a quitting of the certificated parish by the pauper, without intention of returning, shall amount to an abandonment; and that, although (as in the latter case) he does in fact afterwards return.

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when, having a relation in *Frampton* dead, he went by himself, (his wife being dead,) to possess himself of the effects, and remained there about six months, when being taken ill, he was, by the parish of *Tretherne*, recommended to *Gloucester* Infirmary, and there died. But before he went to *Frampton*, to take possession of his relation's effects, *Samuel*, the son, was hired for a year to *Robert Virry*, in *Frampton*, and lived with him for two or three years. On going out of *Virry's* service, he was hired again in *Frampton*, to *Richard Clutterbuck*, and lived with him for two or three years, and till after his father died. The son afterwards married, and had a child, and his wife and child were the paupers who were removed by the two justices.

Dunning had begun to shew cause why the order of sessions should not be quashed, and cited *Rex* v. *Sowerby* (a), and *Rex* v. *Taunton St. Mary Magdalen* (b), but Lord Mansfield directed the counsel on the other side to go on.

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Howorth, and *Clyfford*, in support of the order of removal, observed, that, in the case of *Rex* v. *Taunton*, the circumstances were very particular. The extraordinary length of time during which the certificate had slept, was considered as a waver of it: but they seemed to doubt the law of that case. It had been settled, they said, in later cases, (as in *Rex* v. *Spotland* (c),) that a voluntary removal of a certificated person from the parish to which he has been certified, will not vacate the certificate; and this without any regard to any interval or length of time. If a pauper can, by length of time, desert and annul a certificate, how is the line of limitation to be drawn? If a month's absence from the parish will not do, will a year, or 10 years, or 18 years? By analogy to the statute of limitations, 20 years, at least, ought to be required. Here, the certifying parish did not look upon the certificate as at an end; for they recommended the father to the *Gloucester* Infirmary, considering him still as their parishioner.

Lord Mansfield,—The exact circumstances of this case have not occurred before, though the principle of desertion, by long disuse, is to be found in that of *Taunton*. But, here, there was no faith given by the parish of *Frampton* to the certificate, as to *Samuel*, whom they never heard of till he came there as an emancipated person. The case seems to be much stronger than that of *Taunton*.

Willes, and Ashhurst, *Justices*, of the same opinion.

Buller,

(a) *H.* 24 *Geo.* 2. *Burr.* Settl. Ca. No. 130.

(b) T. 29 & 30 *Geo.* 2. *Ib.* No. 129.

(c) *H.* 5 *G.* 3. *Burr.* Settl. Ca. No. 170.

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two justices, and the court of King's Bench having been moved for a *mandamus* to the surveyor of that township to collect and levy it on the inhabitants thereof, a rule to shew cause was granted, which was argued this day, by *Bearcroft*, and *Cowper*, against the rule, and *Dunning*, in support of it.

It appeared, from the *affidavits* on the part of *Wiston* township, that the inhabitants of each of the two districts are bound, by prescription, to repair only such part of the highway as is situated in their respective districts.

Against the rule for a *mandamus*, it was argued, that, as the indictment and conviction were of *the whole parish*, the rate was void, for that the justices were only authorised by the act to direct a rate to be made on the *parish*, *township* or *place*, *presented or indicted*. If the township of *Wiston* was intitled to the exemption they now claimed, they ought to have appeared, and pleaded specially to the indictment.

Lord Mansfield absent.

Willes, and Ashhurst, *Justices*, were of opinion, that they were not so tied down by the wording of the statute *(b)*, but that they might construe it agreeably to the justice of the case in the present instance. That the words would admit of such construction. That, as it was sworn directly on the part of *Wiston* township, (and not expressly denied on the other side,) that they had no notice of the indictment, and that the inhabitants of *Kingsley* township alone had taken the defence upon them, it ought to be considered as being substantially an indictment merely against *Kingsley*.

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Buller, *Justice*, concurred; but thought the *mandamus* must be a special writ, suggesting that the part of the highway, which was the subject of the indictment, lay wholly in *Kingsley* township, and that the two townships were separately bound to repair their respective parts of the highway, in order to give the inhabitants of *Kingsley* an opportunity to traverse, by the return, either of those facts.

To this the two other judges assented.

The rule made absolute.

(b) § 45 & 47.

READ *against* WILLAN.

Friday, 2d June.

Horses employed in drawing artillery are billetable under the mutiny act, whether they belong to the ordnance or are furnished for the service by contract.

INdebitatus assumpsit, for hay, straw, and stable-room, found for horses belonging to the defendant. The cause was tried at the last *Lent* assizes for the county of *Kent*, before ASHHURST, *Justice*, when a verdict was found for the plaintiff, with £17. 2*s*. damages, subject to the opinion of the court on a case which stated;

That it appeared, upon the trial, that the plaintiff was an innkeeper at *Rochester*; that the defendant was a contractor with the Board of Ordnance, for supplying horses for the royal train of artillery, under a contract then subsisting with the Board for that purpose; that two contracts were given in evidence; that, on the 10th of *November*, 1778, five horses, the property of the defendant, and marked with the initials of his name, and with the initials of the King's name, and the crown, on the left flank, were *billeted* on the plaintiff, at his inn at *Rochester*, upon their return from the service of drawing the artillery and ammunition for part of the army at *Coxheath* camp, under a route received from the commander in chief at *Coxheath*; which was produced in evidence; that the horses continued under the same billets till the 5th of *June*, when they were attached [423] to another regiment on actual service. It further appeared in evidence for the defendant, that, in the years 1745, 1746, and 1747, when the artillery marched with the army into *Scotland* during the rebellion, the horses drawing the artillery were uniformly billeted in the same manner as the dragoon horses, and other horses of the army; and that, in the year 1756, the horses drawing artillery and ammunition waggons, though not in company with troops, were billeted like other horses of the army under the mutiny act. No evidence was given on the part of the plaintiff to contradict the defendant's evidence.—The question stated for the opinion of the court was, Whether the defendant, under the above circumstances, had a right to billet the horses upon the plaintiff, in the same manner, and at the same rate, as the horses belonging to the light horse and dragoons are billeted under the mutiny act (*a*). If the court should be of opinion, that the defendant had not that right, then the plaintiff to be at liberty to enter up judgment on his verdict for the £17. 2*s*. and costs; but if the court should be of opinion, that he had a right, then

(*a*) 19 *Geo*. 3. c. 16.

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then the verdict and judgment to be entered for £1. 6s. 9d. and costs.

The case was this day argued, by *B. Hunter*, for the plaintiff; and *Erskine*, for the defendant.

Hunter divided his argument into four heads of objection; contending, 1. That the mutiny act, being in derogation of the common rights of the subject, ought not to be extended by construction beyond the strict letter; and that no billeting of any sort is legal, without it is *expressly* authorized by act of parliament; as was manifest from the petition of rights (a), the statute of 31 *Car.* 2. c. 1. § 54. that of 30 *Geo.* 2. c. 2. which was necessary, in order to authorize the billeting of the *Hessian* troops, who were brought over for the defence of this country in the last war, and the 80th section of the very act on which the present action arose (b); which contains a similar provision relative to *American* troops in the service of this country, and sent over here. 2. That artillery horses are not within the reason and spirit of the act, as dragooon horses are; for that, as to the latter, they could not be separated from the soldiers, without great inconvenience and confusion. 3. That the defendant's horses were [424] not on a march, but in winter quarters; and, if the act could be extended to artillery horses when on actual service, it could not apply to horses not in actual employment. 4. That, supposing the Board of Ordnance to have the power of billeting in such cases, that power could not be extended to a contractor, like the defendant; for the Board, it might be supposed, would exercise such an authority without fraud or abuse, to which a private contractor would have many temptations.

Erskine, on the other side, contended, that the real question before the court was, whether horses drawing the artillery are within the true meaning of the provisions in the mutiny act; and that the circumstance of their being furnished by contract did not vary the case. By the common law, he said, soldiers were billeted in the most oppressive manner, without any restriction as to the time, the number, or subsistence; but this mischief was remedied by the petition of right, and the subsequent acts relative to this subject. Can it be argued, that there is no authority to billet horses? The reasoning on the part of the plaintiff might be employed in support of that proposition; for, in the enacting part of the statute, concerning billeting, there is no notice taken of horses *of any sort*. The only words are, "the officers and soldiers

(a) 3 *Car.* 1. c. 1. § 6.

(b) In the mutiny act of 20 *Geo.* 3. c. 12. it is § 79.

1780.

READ against WILLAN.

soldiers in his Majesty's service (a)." But the billeting the *horses*, was considered by the Legislature as a consequence; and accordingly, by a subsequent clause, after reciting, that great inconveniencies have arisen, and may arise, in such places where horses or dragoons are or may be quartered, by the billeting of the men and *their horses* at different houses, contrary to the true intent and meaning of the act, it is enacted, "That, in all places where horse or dragoons "shall be quartered, the men and *their horses* shall be "billeted in one and the same house, &c. (b)." So, in the clause regulating the rate of subsistence, there is a particular provision, fixing the allowance for each horse (c). There can be no doubt, therefore, that *dragoon horses* may be billeted; and, by the 78th section (d), it is expressly declared, "That the officers and persons employed in the "several trains of artillery, shall be, at all times, and in all "respects, within the intent and meaning of every part of "the act (e);" the drivers therefore are clearly billetable; and how strange an interpretation would it be, to hold that *they* are, and that *their horses* are not! It is said, that this statute ought not to be extended beyond the strict letter; but this, like all other statutes, must, while in force, receive a construction consonant to the true intent and meaning of the Legislature; and, as to the present question, the practice in the year 1745, as found by the case, is clearly explanatory of the intention. Frequent instances cannot be expected. Artillery are not wanted, unless in cases of rebellion, or invasion, and indeed the section last mentioned relative to the trains of artillery was not introduced till the year 1740, or 1741; for it is not found in the mutiny act of 1739. As to the contract, it is a great public benefit, since it enables the Board of Ordnance to save the expence of maintaining horses unless when they are actually wanted. By the present contract, which was given in evidence, and is referred to by the case, the defendant is bound to keep and maintain his horses at his own expence, and to keep them in readiness till called out, (the ordnance giving ten day notice); but, when they are mustered, they are to be paid for at the same rate with dragoon horses. It is said, that the defendant's horses were in winter quarters. That is immaterial. The question

[425]

(a) 19 *Geo.* 3. *c.* 16. § 26. p. 369. Same § of 20 *Geo.* 3. *c.* 12. and § 22 of 4 *Geo.* 3. *c.* 3. which is the mutiny act, printed in *Ruffhead's* Statutes.

(b) 19 *Geo.* 3. c. 16. § 31. pa. 373. 20 *Geo.* 3. *c.* 12. § 31.

(c) 19 *Geo.* 3. c. 16. § 37. p. 376. 20 *Geo.* 3. *c.* 12. § 37. 4 *Geo.* 3. *c.* 3. § 33.

(d) pa. 401.

(e) 20 *Geo.* 3. *c.* 12. § 77. 4 *Geo.* 3. c. 3. § 73.

1780.



REID against WILLAN.

question is, whether they were mustered, and in actual service, of which there can be no doubt; for it is stated, that they were under a route from the commander in chief; and, by the contract, they are to continue in service for fifty days certain, and until a written notice from the ordnance.

Hunter, in reply, insisted, that, in the subsistence clause, *all* billetable horses were meant to be specially enumerated, and artillery horses are not mentioned. He observed, that, in 1745, the artillery horses were billeted only during the march and actual employment of the artillery, and that it could not be necessary that horses should be kept at the expence of the subject from *November* till *June*, in order to be employed in *June*.

Lord MANSFIELD,—The facts of this case only give room for the question, whether artillery horses are entitled to be billeted; and I think the affirmative has been argued on unanswerable grounds. The dragoon horses are not mentioned, expressly, in the enacting part, but the horses and men are considered as inseparable. It is no wonder that there was not, at first, any provision about the artillery, because it is so seldom wanted. But the clause introduced in 1740 is decisive. It mentions particularly the *payment of quarters*, which must extend to the horses as well as the men employed. The reason certainly extends to them. Horses are more necessary for artillery than for dragoons, because the artillery cannot possibly be made use of without them. The circumstance of their being hired under a contract does not alter the question.

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WILLES, *Justice*,—Under the distinction that these horses were mustered, and to be considered as in actual service, (which I think, upon the case stated, they were,) I am of opinion they were billetable. Otherwise I should think they were not.

ASHHURST, *Justice*, of the same opinion.

BULLER, *Justice*,—I am of the same opinion. I think the 78th section has the same operation as if artillery horses had been mentioned in all the former parts of the act.

The verdict to be entered for £1. 6s. 9d. only.

1780.

The KING *against* COZENS and Another.

Saturday, 3d June.

When a justice of the peace acts from indirect or corrupt motives, the court will punish him by information.—If a *landlord* tender the poor-rate for his *tenant*, the overseers must receive it, and a warrant ought not to be granted to distrain upon the *tenant*.

THE right of electing members to serve in parliament for the borough of *Dorchester*, in *Dorsetshire*, according to the last resolution of the House of Commons (*a*), " Is in " the inhabitants of the said borough paying to church and " poor, in respect of their personal estates; and in *such* " *persons* as pay to the church and poor in respect of their " *real estates* within the said borough." It is a pretty general practice in the western parts of *England*, for the *owners* to pay the poor-rate instead of the *occupiers*, who are the persons rateable under the statute of *Elizabeth* (*b*). On a petition, complaining of an undue election of members to serve in parliament for *Dorchester*, which came on to be tried before a select committee, appointed under the statute of 10 *Geo.* 3. c. 16. on the 22d of *February*, 1775, it was contended, by the counsel for one of the parties, that "*such persons as pay*" in the words of the last resolution, ought to be construed to mean such persons as by law were bound to pay, and that the landlord ought to be considered as the mere agent of the occupier, and as paying for him, so as to confine the right of voting to *occupiers*. The committee, however, determined, upon evidence of the usage, both before, and since, the date of the resolution, " That such persons as pay in respect of " their real estates, *though not inhabitants or occupiers*, have " a right to vote in that borough (*c*)."

[427]

In consequence of this determination, there was, previous to the last general election, a great struggle in the borough, whether the poor-rate should be, in fact, received from the landlords, or the occupiers. The occupier of a particular house having been rated by name, he was summoned by the defendants, who were two justices of the peace for *Dorchester*, to shew cause why he should not pay the rate. On the day for shewing cause, the overseers of the poor attended, and also a person who was the grandson of the owner of the house, and who, in the presence of the defendants, tendered the sum assessed to the overseers. The defendants asked him *who* he tendered it for; to which he answered, he tendered it for his grandfather. They then asked him, " Don't you " tender it for the occupier?" To this he answered, " No; " I tender

(*a*) 18th *May*, 1720, Journals, vol. XIX. p. 363. col. 2. *Vide* 2 *Geo.* 2. c. 24. § 4.

(*b*) 43 *Eliz.* c. 2. § 1.

(*c*) *Cases of Contr. Elect.* vol. 1. p. 358.

1780.

The King against Cozens.

"I tender it for my grandfather." The defendants then asked the overseers, if they would take the money? which they refused to do; and thereupon the defendants immediately granted a warrant *(d)* to distrain for it on the goods of the occupier. By the lease, the landlord had expressly stipulated to pay the poor-rate.

This was an application for an information against the defendants, and, by the affidavits on the part of the prosecution, it was sworn, that they had acted, (according to the belief of the prosecutor,) from corrupt and criminal motives, and to serve election purposes. This was positively denied by the defendants, but their affidavit did not go on to state their reasons for granting the warrant.

The *Solicitor General*, *Morris* and *Rooke*, shewed cause.—*Dunning* for the prosecution.

Lord Mansfield,—No justice of peace ought to suffer for ignorance, where the heart is right [☞]. On the other hand, when magistrates act from undue, corrupt, or indirect motives, they are always punished by this court. It is impossible for these defendants to excuse themselves upon the [428] ground of ignorance. In many parts of the kingdom the landlord pays the poor-rate for his tenants; and it is sworn, that the landlord in question had actually paid 28 rates before this, without any objection or difficulty being raised. What possible reason could there be for raising one now, for the first time? The justices must have acted with a view to make a point to serve the purpose of an election.

The court proposed, that, upon the defendants' undertaking to pay the whole costs out of pocket incurred by the application, the rule should be discharged, which was accordingly done.

(d) 43 *Eliz.* c. 2. § 4.

[☞] Even where he acts *illegally*. *Rex* v. *Palmer*, *E.* 1 *Geo.* 3. 2 *Burr.* 1162.

Tuesday, 6th June.

Smith and Others *against* Dovers.

In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence of such agreement, the plaintiff may traverse the corrupt agreement, and conclude with a verification.

ACTION upon a bill of exchange for £85. payable 50 days after date, against the acceptor.—*Plea*, That it had been corruptly, and against the form of the statute, agreed, on the 25th of *October*, between one *Sowden* and one *Robinson*, and the defendant, that *Sowden* and *Robinson* should lend to the defendant £80. and should forbear and give day of payment thereof to the defendant from thence till the 20th of *December*, and that for such forbearance he should pay £5.; that after, and in pursuance of this agreement, on the said 25th of *October*, they advanced the £80. and that, for the

the securing that sum and the £5. it was afterwards, (*viz.* on the 1st of *November*, being the day of the date of the bill,) further corruptly, *&c.* agreed between them, that *Sowden* and *Robinson* should draw a bill for £85. payable 50 days after the date to the plaintiffs; that, in fact, they did, after making the last mentioned agreement, and in pursuance thereof, and for the purposes aforesaid, draw such bill, and that such bill so drawn was the identical bill in the declaration mentioned; that the £5. so agreed to be given, and so reserved and made payable, exceeded the rate of £5. *per cent.* for one year contrary to the statute; by means of which premises, and by force of the statute, the said bill was wholly void, and of no force or effect in the law.—*Replication,* (after a general protestation that the plea was insufficient,) That the bill was drawn by *Sowden* and *Robinson*, and delivered to the plaintiffs, for a good and valuable consideration, *without this,* that it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said *Sowden* and *Robinson*, and the defendant, in manner and form as the defendant had alledged, "and this the plaintiffs are ready to "verify, wherefore, *&c.*"—*Special demurrer*; For that, inasmuch as the said traverse in the said replication contained denies the whole substance of the plea of the defendant, as to the said premises and undertaking, no inducement to the same was necessary; nevertheless the plaintiffs have, by an unnecessary and superfluous inducement to such traverse, rendered a conclusion of the said replication with a verification to the court necessary [1]; whereas the said replication, (had the inducement to the said traverse been omitted,) might and ought to have concluded to the country, and the said plaintiffs have thereby calculated the said replication for the introduction of an unnecessary and vexatious length of proceedings; and also for that the inducement to the traverse, containing no new matter, is, in itself, immaterial, superfluous, and unnecessary, and tends to prolixity in pleading; and for that the said replication is in various other respects uncertain, insufficient, and informal.

[429]

Marshall, for the defendant,—Where matter is specially pleaded,

[1] If the special traverse had, in truth, denied the whole matter of the plea, it might have concluded to the country, notwithstanding the introductory inducement, and the formal words, "*absque hoc.*" The contrary, indeed, is stated to have been said by the court in *Baynham* v. *Matthews*, But *vide Haywood* v. *Davies*, (1 *Salk.* 4.) and *Robinson* v. *Raley*, (1 *Bur.* 317.) where this point came directly in question, on the pleadings to the 13th count of the declaration, and the conclusion to the country, though specially demurred to, was held good. *Vide supra*, also, *Boyce* v. *Whitaker*, p. 95. Note 10].

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SMITH against DOVERS.

pleaded, in the affirmative on the one side, and in the negative on the other, a special traverse is unnecessary and improper, because there is a sufficient issue joined, without carrying the plea any further. Here the matter of the plea is fully denied in the replication, which, therefore, should have been without an inducement, and should have concluded to the country. But the plaintiff, by introducing an inducement, and a special traverse, has rendered it necessary to conclude his replication to the court, and put the defendant under the necessity of rejoining. The principle I contend for is established by the case of *Huish* v. *Philips* (a), and recognized and confirmed by that of *Haman* v. *Truant* (b), *Baynham* v. *Matthews* (c), will, perhaps, be cited on the other side, as an authority against me; but, if properly considered, that case will be found only to decide, that, where there is an inducement and a special traverse, the conclusion must be to the court; not that, in a case like the present, there ought to be such inducement and special traverse. On the contrary, the doctrine I am contending for is there expressly admitted by the court. The recent case of *Boyce* v. *Whitaker* (d), is also in point in my favour.

[430]

Cowper, for the plaintiffs,—In the case of *Haman* v. *Truant*, the allegations in the inducement, and in the traverse, were exactly the same thing, in different words, both denying the whole substance of the plea. In *Baynham* v. *Matthews*, the express determination was, that, where the statute of usury is pleaded, and the plaintiff replies, that the security was given for a just debt, and traverses the corrupt agreement, a conclusion to the country is bad, and in *Robinson* v. *Raley* (e), that case is cited, and DENNISON, *Justice*, there mentions both that and another of *Fen* v. *Alston* (f), as having decided, that where the statute of usury is pleaded, the plaintiff may, at his election, either reply, that the security was given upon another account, and specially traverse the corrupt agreement, or directly deny the corrupt agreement, and then conclude to the country (g).

Lord MANSFIELD,—This point is settled by the case of *Baynham* v. *Matthews*.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—There is a distinction which runs through all the cases. It is this: When the whole of the matter of the plea is denied in the replication, it must conclude to the country; but when a particular fact alledged in the plea is selected and denied, then the replication must conclude

(a) C. B. E. 42 El. Cro. El. 754.
(b) B. R. M. 22 Car. 2. 1 Mod. 72.
(c) B. R. T. 4 Geo. 2. 2 Str. 871.
(d) H. 19 Geo. 3. supra, 94.
(e) B. R. E. 30 Geo. 2. 1 Burr. 317.
(f) 1 Burr. 320.
(g) 1 Burr. 321.

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conclude with an averment. Let us examine this replication by that rule. This plea consists of two distinct allegations: 1. That there was a corrupt agreement: 2. That the bill was given in consideration of that corrupt agreement. The replication denies only one of those facts, *viz.* That there was such a corrupt agreement. Therefore, according to the rule, the conclusion here was proper. If the point were new, much might be said on the other side, but the principle is settled and the case of *Baynham* v. *Matthews* is directly in point, and has been confirmed by many subsequent decisions; particularly by *Clark* v. *Glass*(i), cited in *Robinson* v. *Raley*, and *Sandford* v. *Rogers*, in the *Common Pleas*(k). In the case of *Boyce* v. *Whitaker*, the whole plea was denied, *viz.* that the bond was given for *ease and favour.*

[431]

Judgment for the plaintiffs [† 100].

(i) *B. R. T.* 28 & 29 *Geo.* 2. 1 *Burr.* 319 [F].

(k) *H.* 33 *Geo.* 2. 2 *Wils.* 113.

[† 100] *Vide*, as to the point in this case, *Mulliner* v. *Wilkes*, *B. R. E.* 23 *Geo.* 3: *Bush* v. *Leake*, *B. R. T.* 23 *Geo.* 3. & *Slater* v. *Carne*, *B. R. H.* 24 *Geo.* 3. ☞ *Hedges* v. *Sandon*, *B. R. E.* 28 *Geo.* 3. 2 *Term Rep.* 439.

HODGES *against* MIDDLETON and Another.

Tuesday, 6th June

A devise of all the testator's real estate in *A.* to *B.* during life, and at *B.*'s death to the children of *B.* with remainder over, gives either an estate-tail to *B.* or an estate for life to *B.* remainder in tail to the children of *B.*

THIS was a case sent by the Court of Chancery for the opinion of this court, which stated:

That *Frances Bladen*, widow, devised as follows:—" I give to my kinswoman Mrs. *Anne Middleton*, my house and lands at *Arlborough Hatch*, and all my real estate, in the parish of *Barking*, during her life, and at her death, to her children, upon condition that she or they constantly pay £30 a year for a clergyman to officiate in my chapel, &c. and on failure of these conditions here mentioned, then I give the said house and lands to my own next heirs, to be enjoyed on the same conditions; and, *in case of failure of children* of my said kinswoman Mrs. *Anne Middleton*, then I give the house and lands aforesaid to her brother Mr. *George Hodges*, and his children, on the same conditions; and, in case of failure,

[F] See a note of this case in Serjeant *Williams'* note to *Hayman* v. *Gerrard*, 1 *Saund.* p. 103. *a.* where some exceptions are stated to the general rule as here laid down by BULLER, J. with respect to the conclusion of replications.

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failure of his children, then I give the said house and lands to the sisters or sister of the said *Anne Middleton* and *George Hodges*, to be equally divided between them, or their children that are living at that time."—That the testatrix died, leaving the said *George Hodges* her heir at law; that *Anne Middleton* entered upon the premises, and enjoyed them till her death; that she had issue living at the death of the testatrix seven children, two by a former husband, the rest by her then husband *John Lambert Middleton*; that, in 1749, *John Lambert Middleton*, and *Anne* his wife, suffered a recovery, to the use of themselves for life, and to the children of *Anne Middleton*, in such manner as they jointly, or the survivor of them, should appoint, and, in default of such appointment, to the children of *Anne Middleton*, by *John Lambert Middleton*, except the eldest, and the heirs of the several bodies of the said children, share and share alike; that, in 1761, *Anne Middleton* died, and, in 1768, her husband, then Sir *John Lambert Middleton*, died, without having made any appointment; that *Anne Middleton* had issue living at her death six children, (one of them by her first husband,) who entered on the premises on the death of Sir *John Lambert Middleton*, one of them being the eldest son excepted in the declaration of the uses of the recovery; that, in 1770, the six children suffered a recovery, to the use of themselves in fee, and that three of them were since dead; that the bill was brought by *Joseph Hodges*, son and heir at law of *George Hodges*, to have his right to the freehold and inheritance of the said premises, subject to the life estates of the surviving children, declared, and for an injunction against waste.

[432]

Upon the above devise, and facts, the order of the Lord Chancellor (a) directed, that the question should be, "What "estate *Anne Middleton* took, and whether the children of "the said *Anne Middleton* took any, and what estate in the "premises in question, under the will of *Frances Bladen*, the "testatrix in the pleadings of the said cause named?"

HILL, *Serjeant*, for the plaintiff, contended, that *Anne Middleton* only took an estate for life, and that her children (being *in esse* at the death of the testatrix, which happened only a year after the date of the will, and, therefore, probably *in esse* also at the date of the will,) took an estate for life by purchase in joint-tenancy. The words, "all my real estate "in the parish of *Barking*," were descriptive only of the local situation, not of the quantity of interest meant to be devised. It is laid down by Lord *Coke*, in his Commentary upon *Littleton*, that if *B.* have divers sons and daughters, and *A.* give lands to *B.* and *liberis suis*, the father and all the children take jointly (b). So in *Cook* v. *Cook* (c), it is said, "That

(a) Dated 11th *February*, 1780.
(b) Co. *Littl.* 9. a.
(c) *Canc. E.* 1706. 2 *Vern.* 545.

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" That if there is a devise to *J. S.* and his children, if he " hath children, they take with their father; but if he hath " no child, it is an estate-tail." And in *Wild's Case (d)*, this distinction is made, and it was there solemnly determined, after argument before all the judges, that land being devised to *A.* and his wife, and after their decease to their *children*, they then having issue a son and a daughter, *A.* and his wife had but an estate for life, with remainder to their children for life. *Goodwin.* v. *Goodwin (e)*, in another case to the same purpose.

[433]

Wilson, for the defendants,—1. If *Anne Middleton* took an estate-tail under the devise to her and her children; or, 2. If the children took a remainder in fee as purchasers, the plaintiff must fail in his claim. 1. It is admitted, that there are cases where the word " *children*," in a will, is a word of limitation, and creates an estate-tail *(a)*; and Lord *Hale*, in delivering his opinion in *King* v. *Melling (b)*[☞], seems to think it may be *nomen collectivum*, although there be children then *in esse*. There is a case in 1 *Anders.* 43. (*H.* 6. *Eliz.*) where the devise was to *A.* for the term of his life, and, after his decease, to the *men children* of his body; and it was held, that *A.* took an estate-tail. This seems to be the same case which is cited both in *Moore*'s and Lord *Coke*'s report of *Wild's Case*, from *Bendloe's* Reports, 4 *Eliz.* *Moore*'s state of it is nearly the same with *Anderson*'s. Lord *Coke* does not mention that the words "*for life*" were used, which certainly make the decision stronger; and he must be incorrect in saying, *that it was d*
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(d) B. R. *H.* 41 *Eliz.* 6 C
S. C. *Moore* 397. under the
Richardson v. *Yardley*. *Poph*
Gawdy thought it an est
Moore, *loc. cit.*

(e) *Canc.* 3 *July*, 1746.
370. But the point of cons
was not determined in that ca

(a) *Vide H.* 20 *G.* 3.
Stevens, *supra*, *p.* 321.

(b) B. R. *M.* 24 *Car.* 2. 1 *Ventr.* 225. 231.

[☞] " It is a great misfortune ere is no report of that case *(King Melling)*, by Lord *Hale* himself, or his own argument, for though the ses there cited are often mentioned judges, yet there is no certainty of e correctness of the report." *Dict.* r *Hardw.* *Letheullier* v. *Tracey*, inc. 1754. *Ambl.* 220. 223. and in C. 3 *Atk.* 796. his Lordship says, This case of *King* v. *Melling*, is very imperfect in *Ventris*, especially as to the cases said to have been cited by *Hale*.

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that the *testatrix* had "issue in general" in contemplation, which *might or might not* fail; for these words would have been absurd, if she had meant only persons then existing, or descendants in the first degree, because they *must* fail. In a late case of *Cookson, Lessee of Rous* v. *Rous* (c), your Lordship, in delivering the opinion of the court, said, that, from the words "*in case*" being used, the court must hold, that the testator had some *contingency* in contemplation. From the conditions imposed by the devise, it must be inferred, that the word "children" was meant as expressive of the *interest* devised to *Anne Middleton*; for if it had been the intention of the testatrix to give estates by purchase to her children, it is hardly possible that she should have made the non-performance of the conditions *by the mother*, operate without any fault of theirs, as a forfeiture of their interest.

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2. If *Anne Middleton* took only for life, I contend, that the children took an estate in fee. It cannot be denied, that "all my real estate" are words which in general in a will would carry the fee-simple. But it is said, 1. That the additional expression of "in the parish of *Barking*," makes the preceding words operate as descriptive of the local situation, and not of the quantity of interest meant to be devised. In answer to this, it is to be observed, that, in none of the cases where the word "*in*" has been used, has "all my estate," been held to be only descriptive of situation, although, where "*at*" has been the word, that construction has sometimes been adopted. Indeed in the case of *Ibbetson* v. *Beckwith* (a) Lord *Talbot* denied this distinction, and decided, that, although the words there were "all my estate *at* N." a fee-simple passed; and *Wilson* v. *Robinson*, there cited, is to the same purpose (b). 2. It is said, that, if the words here used are descriptive of the place, not of the interest, *with regard to the first limitation*, which must be admitted on the present supposition, *viz.* that *Anne Middleton* only took an estate for life, they must operate in the same manner *with regard to the subsequent limitation* to the children. To this objection, the case just cited, of *Ibbetson* v. *Beckwith*, furnishes a complete answer; for, there, the devise was of "*all my estate at N.* to "my mother for her natural life, and to my nephew *Thomas*, "after her death," and it was held, that the mother took an estate for life, and *Thomas* a remainder in fee.

Hill, Serjeant, in reply, said, he admitted that the words "*in case*" shewed that some contingency was in contemplation: but it was the contingency of there being no issue alive at the death of *Anne Middleton*.

The

(c) B. R. M. 17 Geo. 3.

(a) Canc. M. 1735. Ca. Temp. Talb. 157.

(b) B. R. M. 25 Car. 2. 2 Lev. 91.

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[435]

The court did not deliver any opinion on this case from the bench.

The certificate was in the following words:

"We are inclined to think, that, under the will of *Frances* "*Bladen*, the testatrix, *Anne Middleton*, took an estate-"tail [F]; but, if she took an estate for life only, we are of "opinion, that her children would take an estate-tail; and, "in either case, the limitation to *George Hodges*, the heir at "law, was barred by recovery, and the plaintiff has no title.

MANSFIELD,
E. WILLES,
14th *June*, 1780. W. H. ASHHURST,
F. BULLER."

IN the night between *Tuesday* the 6th, and *Wednesday* the 7th of *June*, Lord MANSFIELD's house in *Bloomsbury-square*, was attacked by a party of the rioters, who, on the *Friday* and *Tuesday*, to the amount of many thousands, had surrounded the avenues to the two Houses of Parliament, under pretence of attending Lord *George Gordon*, when he presented the petition from the Protestant Association [I]. On

[I] Lord MANSFIELD acted at that time as Speaker of the House of Lords, in the absence of the Lord Chancellor, who was ill.

[F] It was obviously not necessary to the decision of the court, that they should determine that *Anne Middleton* took an estate-tail; and there seems considerable reason for questioning that construction. For, if the children were *in esse* at the date of the will, (see the beginning of Serjeant *Hill*'s argument) *Wylde*'s case is expressly in point, to shew that the mother would take for life only. The present case, on this construction, is observed by Lord ALVANLEY, *C. J.* in the case of *Seale* v. *Barter*, 2 *B. & P.* 485. to be a strong case; and the variance between such a decision and the authority of *Wylde*'s case is mentioned by the reporters, and confirmed by reference to *Ginger* v. *White*, *Willes* 353.: where the chief justice states, "If a devise be to *A.*, and *after his decease*, to his children. *A.* has only "an estate for life; because then "the words plainly shew that the "children were intended to take by "way of remainder." And this position seems to have been laid down generally, whether such devisee have children or not; as, indeed, it was necessary for the purpose of that decision, since it appears that the devisee, in that case, who was held only to take for life, never had any issue.

1780.

HODGES against MIDDLESON.

On the *Tuesday* evening the prison of *Newgate* had been thrown open, all the combustible part reduced to ashes, and the felons let loose upon the public. It was after this attempt to destroy the means of securing the victims of criminal justice, that the rioters assaulted the residence of the chief magistrate of the first criminal court in the kingdom; nor were they dispersed till they had burnt all the furniture, pictures, books, manuscripts, deeds, and, in short, every thing which fire could consume in his Lordship's house [2]: so that nothing remained but the walls; which were seen the next morning almost red hot, from the violence of the flames, presenting a melancholy and awful ruin to the eyes of the passengers.

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On *Wednesday*, the devastation became almost general throughout *London*. The houses of many of the most respectable individuals had been previously attacked: That evening, the *Fleet* and *King's Bench* prisons were set on fire; the Bank of *England*, the Inns of Court, almost all the public buildings, were threatened with destruction: and an universal conflagration must have taken place if the King had not issued a pro-

[2] The amount of that part of Lord MANSFIELD's loss which might have been estimated, and was capable of a compensation in money, is known to have been very great. This he had a right to recover against the *Hundred (a)*. Many others have taken that course *(b)*; but his Lordship has thought it more consistent with the dignity of his character, not to resort to the indemnification provided by the legislature. His sentiments on the subject of a reparation from the state were communicated to the Board of Works, in a letter (c) written in consequence of an application which they had made to him, (as one of the principal sufferers,) pursuant to directions from the Treasury (*d*), founded on a vote of the House of Commons (*e*), requesting him to state the nature and amount of his loss. In that letter, after some introductory expressions of civility to the Surveyor General, to whom it was addressed, his Lordship says, " Besides what is irreparable, " my pecuniary loss is great. I ap- " prehended no danger, and there- " fore took no precaution. But how " great soever that loss may be, I " think it does not become me to " claim or expect reparation from the " state. I have made up my mind to " my misfortune as I ought: with this " consolation, that it came from those " whose object manifestly was gene- " ral confusion and destruction at " home, in addition to a dangerous " and complicated war abroad. If I " should lay before you any account " or computation of the pecuniary " damage I have sustained, it might " seem a claim or expectation of " being indemnified. Therefore you " will have no further trouble upon " this subject from, *&c.*

" MANSFIELD."

(a) Under 1 *Geo.* 1. *st.* 2. *c.* 5. § 6.
(b) *Vide infra* p. 699.
(c) Dated *Kenwood*, 12 *August*, 1780.
(d) Dated 18 *July*, 1780.
(e) 6 *July*, 1780.

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HODGES against MIDDLETON.

a proclamation for the speedy and effectual interposition of the military power. Till then, the soldiery had scarcely dared to act offensively [3]; the ordinary magistrates were, for the most part, deterred, or prevented by various causes, from giving their sanction to the employment of the troops; and, in many places, the men under arms, with their officers at their head, though drawn up in military order, did nothing more than preserve a space between the incendiaries and the crowd of spectators, so as to have the effect of enabling the former to demolish the houses and property of their fellow subjects without interruption [4].

The courts of justice continued, on the *Wednesday*, to sit, in order to do the business of course; but almost every where else, except in *Westminster Hall*, the rioters seemed, that day, to have obtained a complete mastery, and a real anarchy pervaded all parts of the metropolis. The execution done by the troops on the night between the *Wednesday* and *Thursday*, though very few lives were sacrificed, produced a happy revolution. The numerous bands of rioters had entirely vanished on the *Thursday* afternoon; scarce a single badge of the Protestant Association, (which was a blue cockade, and which all the rioters wore,) was to be seen; and the total suppression of this insurrection, in its circumstances without example in the history of *Europe*, was as sudden as its rise. The encampment of large bodies of the army and militia in and near *London* for several months, prevented the renewal of the commotions there; and, although a scene of the same sort took place a few days afterwards at *Bath*, and was commenced, or expected, in other parts of *England*, similar precautions entirely extinguished, not only all danger, but all apprehension, in the space of a few weeks.

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On *Thursday*, the 8th, and *Friday*, the 9th of *June*, the Courts only sat to hear motions.

[3] A proper precaution used in ordinary cases to prevent a rash interposition, had been mistaken for a rule of law, *viz.* that no man ought to resist force by force, without the express direction of a civil magistrate.

[4] The mischief the rioters did, was from a persuasion, confirmed by example, that the troops did not dare to act. *Brackley Kennet*, the Lord Mayor of *London*, was prosecuted by information, and, upon a full trial, convicted of a breach of duty, because he had not ordered the troops to quell the rioters by force.

1780.

Saturday, 10th June.

HOLMES, Lessee of BROWN, *against* BROWN.

The grounds for granting a trial at bar are, great value, probable length, and probable difficulties, in the trial. —The court may lay the party applying under the terms of receiving *nisi prius* costs, and paying *bar* costs.

THIS was an application for a trial at bar. *Kenyon*, some time before, had obtained a rule to shew cause, and *Partridge* this day shewed for cause, (upon affidavits,) that the lessor of the plaintiff was in such indigent circumstances, as not to be able to bear the expence, and that one of his witnesses was a woman of above 80 years of age, who might die before a trial at bar could be had. The value of the premises was stated to be about £2000 a year; and the question, whether a codicil to a will by which they were devised was duly executed. *Partridge* cited Lord *Sandwich*'s *Case* in *Salkeld* (a).

Kenyon, in support of the rule, said, that the grounds on which a trial at bar ought to be granted, were, the great value of the subject-matter of the litigation, the probable length of the enquiry, and the likelihood that difficulties might arise in the course of the trial [1]. He then endeavoured to shew, that these reasons co-operated in this case.

Lord MANSFIELD absent.

The court were of opinion, that this was a case where it was fit, that a trial at bar should be granted; but said, that, [438] as it was a favour asked by the defendant, they would lay him under the terms, that, if he succeeded, he should only have *nisi prius* costs; but that, if the lessor of the plaintiff were to succeed, *he* should have bar costs; and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. It was also, (by consent,) made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.

The rule made absolute.

(a) *B. R. T.* 11 *Will.* 3 & *T.* 4 *Ann.* 2 *Salk.* 648.

[1] The words of the statute of *Westminster* 2. (13 *Edw.* 1. c. 30.) are; "*Sed inquisitiones de grossis & pluribus* "*articulis, quæ magnâ indigent examinatione, capiantur coram Justiciariis* "*Banci.*" ☞ *Vide Rex* v. *Amery*, T. 26 Geo. 3. 1 Term Rep. 363.

MASON *against* SKURRAY.

Saturday, 10th June.

Where a new trial has been granted, and nothing was said in the rule, concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first.

ACTION on a policy of insurance; verdict for the defendant; new trial granted; and a second verdict for the defendant. The rule for a new trial had not been drawn up "upon payment of costs, nor had the costs been reserved." On *Saturday*, the 27th of *May*, *Cowper* obtained a rule to shew cause why the defendant should not be allowed the costs of the first trial.

Dunning now shewed cause.

Lord MANSFIELD absent.

The court said, as nothing had been said about the costs of the first trial in the rule, and they had not been reserved to abide the event of the second verdict, the defendant was not entitled to receive them.

The rule discharged [† 101].

[† 101] *S. P. Schulbred* v. *Nutt*, *B. R. M.* 23 *Geo.* 3. ☞ And *Hankey* v. *Smith*, *B. R. M.* 30 *Geo.* 3. 3 *Term Rep.* 507 [F].

THELLUSSON *against* STAPLES.

Tuesday, 13th June.

In taxing costs, the contingent losses which witnesses may have suffered by obeying the *subpœna*, cannot be allowed.

IN this cause *(a)*, two of the plaintiff's witnesses were foreigners *(b)*, being the captain and first lieutenant of a ship, which was a *French* merchantman. They had been brought over to give evidence in the case of *Thellusson* v. *Fergusson (c)*, had returned to *France*, and were again brought over for the trial of this cause. Upon the taxation of the plaintiff's costs, the master allowed the expences of the

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(a) Supra, p. 366. *Note* [9].

(b) But only one of them was *examined*, either on the trial of *Thellusson* v. *Fergusson*, or *Thellusson* v. *Staples*. *Supra*, p. 361. 366. *Note* [9].

(c) Supra, p. 361.

[F] The same rule of practice has been confirmed also in *Smith* v. *Haile*, 6 *T. R.* 71, and *Bird* v. *Appleton*, 1 *East*, 111, though different from that established in C. B. where the party who succeeds at the second trial has the costs of both; if both verdicts are the same way. But if the two verdicts are different ways, the party succeeding has only the costs of the second, whether costs are given by the terms of the rule in K. B. (*Austen* v. *Gibbs*, 8 *T. R.* 619.), or by the general practice in C. B.

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THELLUSSON against STAPLES.

the two witnesses in the journey and voyage going and coming, and during their stay in *England*; but the insured, for whom the plaintiff *Thellusson* was only an agent, and who was a merchant in *France*, stated to the court, in an affidavit, that the two witnesses, when they were last in *France*, had been appointed supercargoes to two *French East-India* ships, and that they had lost their voyage by their attendance on this last trial; that before they left *France*, they made a protest against him, on account of any damages or loss they might sustain by coming to *England*; and that he believed that, on his return to *France*, he should be obliged to indemnify them. That as supercargoes they would have been entitled to five pounds sterling *per cent.* on the produce of the outward and homeward-bound voyages; besides provisions, and other advantages. The master having refused to make any allowance on the above account, *Douglas* now moved for a rule to shew cause why he should not review his taxation, and make an allowance adequate to what, by computation, the insured would, according to his affidavit, be liable to pay.

Lord MANSFIELD absent.

The court refused the rule, and said, they could not allow for contingent damages; that it would be a dangerous precedent; and that the master had certified, that such applications had frequently been made, and always without success.

Tuesday, 13th June.

The KING *against* the Inhabitants of HANWOOD.

When a hiring, upon the face of it, appears to be for less than 365 days, no usage, to consider the time specified in the hiring as a year, will make such hiring sufficient for the purpose of a settlement [F].

JOSEPH BROWN, his wife and child, were removed, under an order of two justices, from the township of *Leeds*, in the borough of *Leeds*, to the township of *Hanwood*. Upon an appeal, the court of quarter-sessions confirmed the order, and stated a special case, as follows:

" It appeared in evidence, that *Joseph Brown*, the husband, " in the year 1774, being then a single man, and an inhabit- " ant as a servant in husbandry, at *Hanwood*, wanting again " to hire himself as a servant in husbandry, offered himself " at the statute-fair at *Hanwood* aforesaid, where there is a " custom

[F] So in *R.* v. *Standon Massey*, 10 *East*, 576, where there was a statute-fair held yearly on the day after old *Michaelmas*, except when old *Michaelmas* fell on a *Saturday*, and then the fair was held on the *Monday* following; it was decided, that a hiring from such *Monday's* fair till old *Michaelmas* following, would not support a settlement.

1780.

The King against Hanwood.

" custom for servants to hire at the statute day, on the last " *Monday* in *October*: but not meeting with a master there, " he went to the market-town of *Otley*,* about eight miles " distant from *Hanwood*, where there is a different custom, " for servants to hire by the year at two different statutes; " one held on the *Friday* before old *Martinmas* day, the " other on the *Friday* next after old *Martinmas* day; at " which latter statute-fair they always hire till the old *Martinmas* day following, which, by the custom, is considered " as a hiring for a year. Old *Martinmas* day, in 1775, was " on a *Tuesday*. On the *Friday* following, being the second " statute-fair above mentioned, the pauper hired with one " *Pike*, to serve his mother, *Ann Frith*, in *Hanwood*, till old " *Martinmas* day following, and did accordingly serve her in " *Hanwood*, till the old *Martinmas* day following."

* [440]

Dunning shewed cause, and relied on the case of *Rex* v. *Navestock* (a), where a hiring at a statute-fair, held on the day *next after* old *Michaelmas* day, to serve *till* the old *Michaelmas* day following, such sort of hiring being stated to be according to the custom and usage of the country, was held to be sufficient. The principle in that case, he said, was not new. It was settled by a prior decision, in *Rex* v. *Newstead* (b), where the hiring was to serve for a year from *Whitsuntide* and *Whitsuntide*; and the court held *that* to be a good hiring, although the space of time was, in truth, less than 365 days, the case having stated that such hiring was usual in that country, and was always considered as a hiring for a year by the contracting parties. He contended, that the customary year at *Otley* ought to govern this case as the contract was made at that place, although the service was performed at *Hanwood*.

Fearnly argued on the other side.—He cited the cases of *Pepper-harrow* v. *Trensham* (a), *Coombe* v. *Westwoodhay* (b), *Rex* v. *Westwell* (c), *South Cerney* v. *Coultshourn* (d), and *Rex* v. *Newton* (e), as having completely established, that no hiring, which, on the face of the contract appears to be for a less time than a year, is sufficient for gaining a settlement. In *Rex* v. *Newstead* that was not the case. *Whitsuntide* being a moveable feast, there was not necessarily less than a year in the interval between *Whitsuntide* and *Whitsuntide*. In *Rex* v. *Navestock*, the hiring was for a full year, if, under the

(a) *M.* 13 *Geo.* 3. *Burr. Settl. Ca.* No. 222.

(b) *T.* 10 *Geo.* 3. *Ibid.* No. 208.

(a) *M.* 1 *Geo.* 1. 3 *Burn's Just.* 12th Edit. 375.

(b) *H.* 5 *Geo.* 1 1 *Str.* 143.

(c) *T.* 3 *Geo.* 2. 3 *Burn's Just.* 375.

(d) *Ibid.* 375, 376.

(e) *M.* 14 *Geo.* 2. *Burr. Settl. Ca.* No. 551.

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the words "*till* the *Michaelmas* day following," that day was included [1]; and Lord Mansfield expressly said, in that case, that there must be a hiring for a year.

Lord Mansfield absent.

Willes, *Justice*,—The only question is, Whether a hiring for three days less than a year, can be construed a hiring within the meaning of the statute? The cases cited by Mr. *Fearnly* all shew the contrary. In the case of *Rex* v. *Newstead*, the duration was uncertain, and the hiring was supported by the custom of the country. In *Rex* v. *Navestock*, as there is no fraction of a day, and the word "*till*" might be construed to include the *Michaelmas* day, the hiring was considered as for a complete year; and the court there recognized the general doctrine contended for by Mr. *Fearnly*. The custom here, (if it could be of any weight to controul an act of parliament,) is stated to be custom of *Otley*, and the contract was performed in another place. I think the orders must be quashed.

Ashhurst, *Justice*, of the same opinion.

Buller, *Justice*,—There is no case where the time appeared manifestly to have been less than a year, in which the court has held that a settlement was gained; and it would be dangerous to make a new precedent of that sort.

Both the orders quashed.

[1] In that case the court laid some stress on the custom of the country, *Burr. Settl. Ca. p.* 722.); but, in a late case of *Rex* v. *Syderstone*, (*E.* 17. *Geo.* 3.) a hiring on the 11th of *October* 1771, *till* old *Michaelmas* day 1772, was held to be a sufficient hiring, though there was nothing stated of any custom or usage [† 102].

[† 102] *S. P. Rex* v. *Swalcliffe*, *H.* 23 *Geo.* 3. ☞ *Rex* v. *Skiplam*, *M.* 27 *Geo.* 3. 1 *Term Rep.* 490.

Tuesday, 13th June.

The King *against* Smith and Others.

The right to the soil of a *navigable* river, is not, by presumption of law, in the owners of the adjoining lands. It is an offence at common law, to obstruct the execution of powers granted by statute, and an indictment for such offence need not, and ought not, to conclude "*contra formam statuti.*"

THIS was an indictment against the defendants, for obstructing the mayor and commonalty of the city of *London*, in making a horse-towing path on the soil of the river *Thames*, under powers vested in them by the statutes of 14 *Geo.* 3. *c.* 91. and 17 *Geo.* 3. *c.* 18. The *first* count recited the act, and charged, that a horse-towing path was begun to be made from *Water-lane* at *Richmond* bridge and certain wooden piles fixed, by order of the common council, on the

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the soil and bed of the river, between high-water mark and low-water mark, and that the defendants, intending to obstruct the mayor, &c. cut down one of the said piles, &c. The *second* count laid the piles to have been driven upon the soil and bed of the river, being the King's ancient common highway for all the liege subjects to navigate. The *third* count laid the towing path to have been begun between the city of *London* and the city-stone at *Staines* bridge, between high-water mark and low-water mark. The *fourth* count stated, that a towing path was begun, &c. by the *committee*, (naming them,) appointed by the common council to execute the act, on the *soil*, &c. being the King's ancient and common high-way, between high-water mark and low-water mark, &c. The *fifth* count set forth, that a towing path had been begun by order of the common council, &c. (but without mentioning the act of parliament). The *sixth* and last count resembled the *fifth*, only stating, that the towing path had been begun by order of the committee. The cause came on before Ashhurst, *Justice*, at the last *Lent* assizes for the county of *Surry*, when a verdict was found for the King, subject to the opinion of the court on the following case:

"The city of *London*, under the powers supposed to be delegated to them under the act of parliament of 11 *Geo.* 3. *c.*91. and by the 17th of the same King, [illegible] c. 18.) erected piles on the bed of the river near *Richmond*, within the high-water mark, about the distance of [illegible] feet from the shore, for the purpose of making a towing path for horses, adjoining and contiguous to a *wharf* in the possession, and the property of the defendants or of those under whom they claim. The defendants cut down one of those piles, which is the subject of the present indictment, and which was proved to have been erected between the high and low-water mark, opposite to the said wharf. No acts of ownership were proved, *on either side*, on the spot in question; but it was proved, that the *ait* (*a*) in the middle of the river was Mr. *Price's* (*b*). It was proved that, immemorially, at the time of low-water, persons used to pass on foot between the high and low-water mark, for the purpose of towing barges and other vessels.

"The question submitted to the court is, Whether, (this "being a navigble river,) the right to the soil in the bed of "the river, *usque ad filum aquæ*, is in the owners of the "ground adjoining to the river?"

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The case was argued, last term, on *Wednesday*, the 3d of *May*, by *Erskine* for the prosecution, and *B. Hunter* for the defendants.

Erskine

(*a*) A small island. (*b*) *Price* was the owner of the wharf.

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Erskine contended, that the only question brought before the court was, Whether the soil of the spot in question was, or was not the property of the defendants, or of those under whom they claimed? Its being the property of third persons would not be a justification on this indictment; for the defendants were not entitled by law to abate the piles driven on another person's ground, for a consequential injury to theirs. The defendants, therefore, must shew that the soil was theirs; and as they gave no proof of any actual exercise of ownership, it was incumbent upon them to maintain it was theirs by inference of law, because the property in the adjoining ground belonged to them.

Hunter insisted, 1. That the statutes did not mean to vest in the city the power of making towing paths by *embankment*; 2. That the soil belonged to the defendants, and they were therefore protected by the 16th section of the statute, by which it is provided, "That the powers granted to the city "should not extend to anthorize them to make any *new* tow-"ing path, over, upon, or through, any garden, orchard, "*yard*, park, paddock, inclosed lawn, or planted avenue, to "any house, without the consent of the owner thereof." 3. That supposing it uncertain to whom the soil belongs, the city had not complied with the terms prescribed by the statutes to entitle them to make a horse-towing path.—1. On the first point, he said, that there was no express power given to make *embankments*, and the court would not raise a power, liable to great inconvenience and abuse, by implication. If such embankments could be made at the pleasure of the city, they would tend to diminish the value of the adjoining lands, and might alter the course of the river, besides exposing the villas and property of individuals to the disorders and trespasses which bargemen might commit in passing through them.—2. On the second head, he said, that, if the soil was in the defendants, the case was clearly within the provision of the 16th section of 14 *Geo*. 3. *cap*. 91; for though *wharfs* are not expressly mentioned, they might be fairly construed to be comprehended under the word "*yard*." That this was a *new* towing path was clear, because the case only stated, that persons *formerly* used to pass on foot *at the time of low* [444] *water;* but this would make a passage *at all times*. As to the property, the legal presumption was certainly in favour of the defendants, and there being no evidence on either side, the presumption ought to prevail. The soil must have some owner; the city had no claim to it; they did not pretend any right of ownership at the trial; and, as to the right of the crown, a distinction was to be made: that right was only in navigable rivers, as far as the sea ebbs and flows. It did not depend alone on the circumstance of the river being navigable. Some rivers were so immemorially, by nature, and from the

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the flux and reflux of the sea; others were kept in a navigable state by the effects of art. The *Thames* might be considered as falling under the first description up to *London* bridge. From thence upwards, it was preserved in a navigable state by art. The authorities concerning the right of the crown to the soil extended only to navigable rivers of the first sort. The sea did not properly flow above *London* bridge. The tide, beyond that limit, was occasioned by the pressure and accumulation backwards of the *river water*. Therefore the soil there did not belong to the crown. This distinction seemed to be adopted in several cases; 1 *Mod.* 105. *Anon*; 2 *Roll. Abr.* 170. *pl.* 14, 15.; *Davies's Rep.* 55. 57.; *Carter* v. *Murcot* (a). He also stated the pleadings in a case of *Cheshyre* v. *Dunball*, where the same idea was adopted, and which had been settled, on great consideration, by Sir *Joseph Yates*, and *Wynne*, afterwards Baron of the Exchequer in *Scotland* (b).

Lord MANSFIELD told *Erskine*, it was unnecessary for him to reply. His Lordship said, the distinction between rivers navigable, and not navigable, and those where the sea does or does not ebb and flow, was very ancient; but that what *Hunter* contended for, *viz.* a distinction between the case of the tide occasioned by the *flux* of *sea water*, or by the *pressure backwards* of the *fresh water of a river*, seemed to be entirely new, and that there were no facts set forth in the case which let in the consideration of that distinction. That the case did not state, whether the water, when the tide rises at *Richmond*, is fresh or salt, but that it rather took it for granted that it is salt, describing the *Thames* generally as a navigable river. That as to the *first* and *third* objections, there was no question made by the case, on the authority of the city to embank, or whether they had pursued the directions prescribed by the Legislature.

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The verdict of *guilty* was ordered to be entered.

Afterwards, in this term, on *Monday*, the 5th of *June*, *Rous* having moved for judgment against the defendants, *Peckham* obtained a rule to shew cause, why the judgment should not be arrested. He applied for this rule on three grounds, 1. That the offence, (if at all indictable,) was for obstructing the execution of the statute, and, therefore, the indictment ought to have concluded, (which it did not,) that the defendants had acted "*against the form of the statute.*" 2. That the prosecutors ought to have stated, that they had purchased the soil, according to the provision for that purpose in the statute. 3. That, as there are a great variety of powers given

(a) *B. R. H.* 8 *Geo.* 3. 4 *Burr.* 2162.

(b) Those pleadings were furnished him by the *Solicitor General.*

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given by the act, and adapted to a multiplicity of different cases, the indictment was too general and uncertain, not setting forth under what particular clause or power the city had acted.

On his first point, he cited *Hawkins's Pleas of the Crown*, *B*. 2. c. 25. § 116. where it is laid down, "That if an indictment do not conclude *contra formam statuti*, and the offence indicted be *only* prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it(*a*)." But ASHHURST, *Justice*, observing, that it was an offence at common law to obstruct the execution of an act of parliament, this objection was abandoned.

This day, cause was shewn, by *Dunning*, *Davenport*, *Silvester*, *Rous*, *Rose*, and *Erskine*.—They insisted, that the directions in the act for *purchasing* the soil, only related to the case of private owners. If the soil belonged to the crown, the act itself contained the king's consent, and if to the city, (which they said was most probable,) it would be absurd to apply the provisions for purchasing to such a case. But if the case had even stated the property to belong to some private owner, but to none of the defendants, it would not be competent to *them* to question what had been done. Let the *owner* complain of the supposed injury, which he might in an action or indictment for the trespass. *He* might not think it an injury, but a benefit. As to the method pursued by the city, in the execution of the statute, and the particular clauses under which they had acted, their authority was sufficiently shewn in the indictment, which set forth the statute; and none but the actual owners of the ground where they had made the path could question what they had done.

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Peckham, *Mingay*, and *B. Hunter*, for the defendants.

Lord MANSFIELD absent.

WILLES, *Justice*,—Only two of the powers in the act, which are various, are necessary to be observed upon here, *viz*. the power to improve the navigation, and the power to compel a purchase. Now, if *they* are considered together, it will appear, that the improvements are to be carried on without purchasing, where there is no occasion to purchase, and nothing is stated here to shew, that this was a case where purchase was necessary. The indictments sets forth, that the prosecutors were interrupted in the due execution of the act, and *that* is found by the verdict. I see no foundation for arresting the judgment.

ASHHURST, *Justice*, of the same opinion. He said, there was no sort of doubt on the first point.

BULLER, *Justice*,—As to the first point, it was very properly given up; the indictment would have been wrong, if it had

(*a*) P. 251.

had concluded *contra formam statuti.* I think, on the face of the indictment, we must take the soil of the spot in question to be in the crown; for, though not necessarily, yet, *primâ facie* [F], the soil of a navigable river belongs to the King. The fact of the obstruction is sufficiently averred.

1780. The KING against SMITH.

The rule discharged.

ON *Wednesday*, the 14th of *June*, being the last day of the Term, Lord MANSFIELD was in court, for the first time since the riots. The reverential silence which was observed when his Lordship resumed his place on the Bench, was expressive of sentiments of condolence and respect, more affecting than the most eloquent address the occasion could have suggested. *Curæ leves loquuntur; ingentes stupent.*

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[F] The law is the same with respect to the shores of the sea, and to the right of all subjects of the King, to take fish found there between high- and low-water mark. *Bagot* v. *Orr*, 2 *B. & P.* 472.

The End of TRINITY TERM 20 GEORGE III

D

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE TWENTY-FIRST YEAR OF THE REIGN OF GEORGE III.

1780.

Monday, 6th Nov.

HEAWARD *against* HOPKINS.

If there is a plea of *tender* as to part and *non assumpsit* as to the residue, and, the plea of *tender* being found for the defendant, the balance proved on the *non assumpsit* is under 40s yet, if that added to the sum tendered exceed 40s. the defendant, though subject to the jurisdiction of the county court of *Middlesex*, is not intitled to double costs under 23 *Geo* 2. c. 33. § 19.

ACTION of *assumpsit* on a tradesman's bill; plea of *tender* as to £2. 18s. 4d. part of the demand; and *non assumpsit* as to the rest. The plaintiff having proceeded to trial, there was a verdict for the defendant on the tender, and for the plaintiff on the *non assumpsit*, but with damages under 40s. *viz.* 7s 6d. The defendant, upon an affidavit, stating that he resided in the county of *Middlesex*, obtained a rule to shew cause why he should not be at liberty to suggest on the roll that the damages were under 40s. in order to entitle himself to the benefit of the statute of 23 *Geo.* 2. c. 33. § 19.

Cause was this day shewn against the rule, by the *Attorney General, (Wallace,)* and *Runnington*. They cited the case of *Pitts* v. *Carpenter (a)*, where there was a plea of set-off, and the plaintiff having proved that there was above 40s. due to him, although the defendant by the set-off reduced the balance

(a) *B. R. T.* 16 & 17 *Geo.* 3. 1 *Wils.* 525.

1780.

HEAWARD against HOPKINS.

balance to £1. 1s. 3d. and the verdict was only for that sum, the court refused a suggestion like that now applied for, because they considered the act as meant to restrain parties within the jurisdiction* of the inferior court from suing in *Westminster Hall*, only in cases where the just demand, *at the time of the action brought*, appears by the verdict not to have amounted to 40s. Now, as in that case it was in the defendant's power not to have pleaded a set-off, in which event the damages must have exceeded that sum, so here, they said, the plaintiff could not foresee that a tender would be pleaded; and, if it had not been pleaded, the damages would have amounted to £3. 5s. 10d.

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Dunning, and *Baldwin*, in support of the rule, insisted, that the defendant ought to have taken the £2. 18s. 4d. when tendered, and then have brought his action only for the balance.

Lord MANSFIELD,—The plaintiff could not know that the defendant would plead a tender. The reason of the determination in the case of *Pitts* v. *Carpenter*, is equally applicable here. The tender was not an extinguishment of the debt, and the question is, what appears to have been due at the time of the action brought, for if that exceed 40s. the inferior court has no jurisdiction.

The rule discharged (c).

(c) Vide *Woolley* v. *Cloutman*, *M.* 20 *Geo.* 3. *supra*, p. 244. *Wase* v. *Wyburd*, *M.* 20 *Geo.* 3. *supra*, p. 246. *Aikway* v. *Burrows*, *M.* 20 *Geo.* 3. *supra*, p. 263. and *Wiltshire* v. *Lloyd*. *E.* 20 *Geo.* 3. *supra*, p. 381.

KIRK *against* STRICKLAND.

Wednesday, 8th Nov.

In debt upon a bond conditioned for an indemnification, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred.

MOTION, by *Chambre*, for a rule to shew cause, why the defendant should not be discharged, upon filing common bail. The action was debt, upon a bond, conditioned for the indemnification of a parish against a bastard child. The penalty in the bond was £50, and the plaintiff, in his *affidavit* for holding the defendant to bail, had sworn that he was justly indebted to him in that sum; but the defendant, in the *affidavit* on which this motion was grounded, swore that only £3, and some odd shillings were really due.

The court said the conduct of the plaintiff was altogether unjustifiable, and that he was liable to an action. That, in the case of a bond conditioned for the performance of a pro-

1780.

Kirk against Strickland.
*[450]

mise of marriage, and in some other instances, the penalty is the real debt; but, in other cases[F 1], the bail could only be taken for the sum to which the plaintiff *would be intitled in damages for the breach of the condition. At first, however, they seemed to think they could not relieve the defendant upon this summary application, it having been an uniform rule[F 2] not to go into the merits, upon such a motion, but to take the matter as it stood upon the *affidavit* to hold to bail; but, at last, they granted the rule, declaring that they were persuaded the plaintiff would not venture to shew cause against it.

Wednesday, 8th Nov.

Willis and Another *against* Baldwin.

Government having contracted to furnish forage for a certain number of horses to be kept by a sutler, and the contractor for forage having agreed not to commute the forage for money, an agreement between the sutler and the contractor, that the latter shall allow the former a sum of money for each ration of forage allowed for the whole number of horses and shall retain the forage, is void.

THIS was an action of *assumpsit* upon an agreement between the plaintiffs and the defendant, which was stated, in the first count of the declaration, to the following effect: The plaintiffs being sutlers to four regiments of militia encamped at *Coxheath*, and as such intitled to certain forage of oats and hay for divers horses daily, out of the King's magazine of oats and hay belonging to the camp, and which was furnished and supplied by the defendant, it was agreed between the plaintiffs and the defendant, that the plaintiffs might abstain from taking the forage, or such part thereof as they should think fit, and might leave the same to be the property of the defendant, and that he should pay and allow them 9½*d.* by the ration, for every ration to which they should be intitled, and which they should so leave at the magazine for the defendant. The declaration then proceeded to alledge, that, in consequence of this agreement, the plaintiffs had left a large quantity of forage at the magazine, which they were entitled to as sutlers to the four regiments, to be the defendant's property, and became, thereby, entitled to receive a sum of money from him in the stipulated proportion of 9½*d. per* ration, which he had refused to pay.—To this special count, were added the general counts, for goods sold and delivered, *&c.*

The

[F 1] S. P. *Hatfield* v. *Linguard*, 6 *T. R.* 217, where defendant was discharged out of custody, the affidavit to hold him to bail stating only the penalty, and not the sum due.

[F 2] This general rule was enforced in *Imlay* v. *Ellefsen*, 2 *East*, 453, the doctrine of which appears inconsistent with the principal case; which was cited there in argument, but not expressly noticed in the judgement.

1780.

WILLIS against BALDWIN.

The cause was tried, before BULLER, *Justice*, at the Sittings for *Middlesex*, in last *Trinity* Term; and it appeared, in evidence, that the plaintiffs had contracted to keep 32 horses, 8 for each regiment, for a limited time; during which they were to be allowed, for each horse, a ration a day, consisting of 18*lb.* of hay, and 8*lb.* of oats: that the defendant was a contractor with government, and, *by his contract*, was bound not to commute the allowance of forage [451] for money, and that, in truth, the plaintiffs had only kept 14 or 15 horses, instead of 32. A verdict was found for the plaintiffs, but with leave to move to set aside, and enter a nonsuit.

A rule was afterwards moved for, and granted, in *Trinity* Term, to shew cause, why a nonsuit should not be entered, or why, if that part of the rule should, upon shewing cause, be discharged, the defendant should not be at liberty to move in arrest of judgment.—The ground for arresting the judgment was, that the agreement was illegal and void, on the face of it, as stated in the declaration, tending manifestly to enable the parties to defraud the public, and divide the profit arising from the value of forage for horses never kept by the plaintiffs.—But, if there was not sufficient on the declaration to shew the illegality of the agreement, it was contended, that such illegality was clearly established by the evidence.

The *Attorney General*, and *Cowper*, now shewed cause.—They said, that to make the agreement void, it must appear to be a certain consequence, that the public must be prejudiced by it, which was not the case; for it neither followed, that, if money was received instead of the rations of forage, the plaintiffs would not keep the stipulated number of horses, and provide forage elsewhere, nor, if the full quantity of forage was delivered over by the defendant, that the plaintiffs would employ it to feed the number of horses they were bound to keep.

Dunning, and *Baldwin*, were to have argued on the other side, but were stopped by Lord MANSFIELD.

Lord MANSFIELD,—No power of words can so bend this case as to make it appear otherwise than as a foul agreement between the parties. The question is not, whether the plaintiffs may not find out a method of cheating government although they should take the forage, but whether what they have done is not a method of cheating government. The plaintiffs are bound to keep eight horses for each of the four regiments, and, in ease of them, government is to feed the horses, supplying a certain quantity, by the day, for each horse that shall be kept. By this agreement, the plaintiffs are to have a composition for the forage for the whole number

1780.
WILLIS against BALDWIN.

ber of horses whether they are kept or not, which is a clear fraud upon the public.—As to the question whether a nonsuit shall be entered, or the judgment arrested, the case is much stronger against the plaintiffs upon the evidence, than as stated in the declaration.

The rule made absolute for a nonsuit to be entered.

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Friday, 10th Nov.

BARNFATHER and Another, Executors of MOFFAT, against JORDAN and Another.

In covenant for rent against an assignee, an assignment to a *feme covert* before the rent accrued, is a good plea in bar.

THE plaintiffs, as executors of an assignee of the lessor of certain premises, brought this action of covenant, for rent in arrear, against the defendants JORDAN and LEFEVRE, as assignees of the original lessee. The defendant *Lefevre pleaded*, That, before the rent in question became due, he he assigned his interest to *Jordan;* which the plaintiffs admitted on the record. *Jordan pleaded*, That, before the rent became due, *Lefevre* assigned his interest to him, and that he assigned to one *Catharine Kingston. Replication*, That at the time of the assignment to *Catharine Kingston* she was covert of one *Thomas Kingston* her husband, who was still living.—*General Demurrer.*

This case stood in the paper, and was to have been argued this day, by *Morgan*, for the defendants, and *Wood*, for the plaintiffs; but *Wood* admitted, that he could not support the replication, on the authority of *Coke Littleton*, where it is laid down, "That a *feme covert* is of capacity "to purchase of others without the consent of her husband, "and that though he may disagree, and divest the estate, "yet if he neither agree nor disagree, the purchase is "good (*a*)."

He moved for leave to withdraw the replication, and reply, *de novo*, upon payment of costs; which was granted.

(*a*) *Co. Litt.* 3. *a*. Also 356. *b*.

1780.

WATERS *against* OGDEN and Another, Administrators of MIEL.

Friday, 10th Nov.

If an executor or administrator plead *plene administravit præter* a certain sum, and afterwards to another action brought in the same term plead also *plene administravit præter* the same sum, and as to that sum that he had confessed it in the other action, such plea is a good bar.

DEBT upon a bond against the administrators of the obligor.—*Declaration* of last *Easter Term.*—*Plea, Plene administravit*, except goods and chattels to the value of £48. 2*s*. 10*d*. and with respect to the said £48. 2*s*. 10*d*. that the * defendants had confessed assets to that amount to another action on a bond of the testator's, of the same term, and then depending against them.—*General Demurrer.*

Bower, for the plaintiff,—An action depending and a confession of assets, without judgment, is not a good plea in bar to an action against executors or administrators. In the other action against the defendants, it is probable the plaintiff suspected the truth of the plea, and therefore took time to enquire into the fact, before he would sign judgment for the £48. 2*s*. 10*d*. If such a plea as this were to be allowed as a bar to another action, a door would be opened to the most palpable fraud, by collusion between the defendant and some friendly creditor, which other *bonâ fide* creditors might never be able to prove; assets might be confessed and protected by such a plea, and all other demands frustrated, although the first plaintiff should never proceed, nor mean to proceed to judgment. It is not priority of action but of judgment which gives a preference to creditors in the same degree. He who first obtains judgment is entitled to be first paid, and here it ought to be considered as the *laches* of the plaintiff in the other action, that he did not enter up judgment of the assets confessed. It is true an executor or administrator cannot pay a debt of the same degree, after action brought and notice given of such action, unless there is judgment for the debt which he pays, but he may pay such debt after judgment, and he is entitled to give it a preference by imparlances and pleading dilatory pleas to the first action, and, in the mean time, confessing judgment for the second demand. This is laid down in *Wentworth's* Office of Executors (*a*), and in the case of *Blundwell* v. *Loverdell* (*b*), where the court distinguishes between such a preference given by the consent of an executor or administrator, in favour of a just debt, and where a debt is set up by covin and collusion. The defendants, here, were in no danger of being obliged to pay the amount of the assets in their hands twice over, for if they had confessed judgment to the present plaintiff, they might have availed themselves of that

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(*a*) 145. (*b*) C. B, *Hil*. 12 *Car*. 2. 1 *Sid*. 21.

1780. WATERS against OGDEN. [454]

that judgment in a plea of *puis darrein continuance* to the other action.

Wood, for the defendants,—If this plea is not a good bar, executors and administrators will be under great difficulties, and liable, in numberless instances, to account for the same assets to two or many different creditors. What other step was left for the present defendants to take? The two actions were brought at one and the same time, (and by the same attorney.) They had only the sum confessed by the plea in their hands, and could not divide it between the two creditors: for, if they had confessed one half of it to each, and *they* had replied assets *ultra*, and issues had been joined, verdicts must have been found against the defendants in both actions. They could not make a voluntary payment to the one, after notice of the action by the other. In short, they had nothing left but to apply the assets by pleading, to one of the demands, and thereby put the plaintiff in that action in a situation to recover judgment, and then plead their having done so, in answer to the other demand. In an anonymous case in *Shower* (c), it is said, that, in case an executor have three or four bonds against him, and they all come to trial at once, being for £20. a piece, and the executor hath assets to the amount only of £20. yet he shall be chargeable to them all; therefore it would have been best for him to have confessed a judgment to one of them, and *that* he might have pleaded to the other. Now the defendants have done all that depended on them to act in the manner there pointed out. The judgment itself is not in their power, it is the act of the court, which ought to follow of course on the confession of assets to the other plaintiff, and it is not to be presumed that he will neglect to avail himself of it. The plea confessing assets to him on the records of the court, is a notorious and public appropriation of those assets to his debt. If the plea was fraudulent or collusive, that might be replied.

Lord MANSFIELD having asked *Wood*, if he had ever seen such a plea, he said he had not, but that there was no case nor authority against it; upon which his Lordship said, he thought the plea accounted very properly for the assets; that the plaintiff was endeavouring unjustly to compel the defendants to pay the amount of the assets twice over; and unless there had been the strongest authorities against the plea, it ought to be supported.

WILLES and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—This is certainly a new case; I believe there never has been such a plea before; but justice is so clearly in favour of the executors, that, unless there were the

(c) *B. R. Easter*, 34 *Car.* 2. 2 *Show.* 202.

1780.

WATERS against OGDEN.

the strongest authorities against the plea, the court must support it. This is a case which is entitled to greater favour than where there is a priority in the judgment, and not in the plea; for as to confessing judgment, that is an act of preference shewn by the executors themselves, but here the preference has been obtained by the greater vigilance of one of the plaintiffs, in calling for a plea before the other. All legal means may be used to obtain such a preference. The defendants, in the first plea they put in, told the real truth of their situation, which they were obliged to do, and having confessed assets to a certain amount, they became bound by the course of law, to pay those assets to the plaintiff in that action. Shall not this be a sufficient answer to the other demand? It would be a monstrous hardship indeed, if the defendants should be obliged to pay the money twice over, and be turned round to seek for redress in a court of equity. I therefore think this is a good plea.

Bower moved, and had leave, (on the ground of the case being new,) to withdraw the demurrer, on payment of costs, the defendants to be at liberty to amend their plea, by stating the judgment which in the mean time had been entered up in the other action, the plaintiff to pay the expence of this amendment, and to take judgment of assets *quando acciderint*.

EATON *against* JAQUES.

Friday, 10th Nov.

If a term is assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, title, interest, &c. of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession.

THIS was an action of debt for rent, against the defendant as assignee of one *Denys*, the original lessee.—The *declaration* stated an indenture of lease from the plaintiff to *Denys*, his executors, administrators, and assigns, for 21 years, at a rent therein mentioned; that *Denys* by virtue thereof entered and became possessed of the premises; and "that being so possessed, on the 21st of *June* 1777, *all* the estate, right, title, term of years to come and unexpired, property, profit, claim, and demand whatsoever of the said *Denys*, of, in, and to the said demised premises, by assignment thereof then duly made, came to and vested in the defendant, by reason whereof the defendant became, and was, and from thence hitherto had been, and still was possessed of and in the said demised premises; and that since he was and became assignee as aforesaid a year's rent had become due at *Christmas* 1779, and was in arrear."—The defendant *pleaded*, That *all* the estate, right, title, &c. (in the words of the declaration,) did not come to and vest in the defendant, by assignment thereof, and that he was not *possessed* of and in the said demised premises in

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manner

1780.

EATON against JAQUES.

manner and form, &c.—*Issue* being joined upon this plea, the cause came on for trial, before BULLER, *Justice*, at the sittings for *Middlesex*, in last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court upon a case which set forth—"That, on the first of *December*, 1775, the plaintiff demised the premises in question to *Denys*, as stated in the declaration; That, on the 21st of *June*, 1777, by indenture made between the said *Denys* of the one part, and the defendant of the other part, after reciting the said indenture of lease, the said *Denys*, (for the considerations therein mentioned), bargained, sold, assigned, transferred, and set over unto the defendant, his executors, administrators and assigns, the premises demised by the lease, and *all* the estate, right, title, interest, benefit of renewal, term of years, and time to come and unexpired, property, profit, claim, and demand whatsoever of the said *Denys*, of and in the same, by virtue of the said lease, or otherwise howsoever, to hold unto the defendant for *all* the rest, residue, and remainder of the said term of 21 years, by the said indenture of lease demised, and *subject nevertheless to the rents and covenants therein contained*, and which are on the tenant's part to be paid, kept, and performed, *in which said indenture is contained a proviso for making the same void* on payment of £114, and interest at 5 *per cent. per annum* in manner following, *viz.* £2. 17*s.* being half a year's interest thereof, on the 21st of *December* then next ensuing, the further sum of £2. 17*s.* on the 21st *June*, 1778, the further sum of £2. 17*s.* on the 21st of *December* in that year, and the further sum of £116. 17*s.* on the 21st of *June*, 1779; and *there is another proviso* and agreement between the parties that, *until default should be made of payment* of the £114 and interest, contrary to the intent of the said proviso, *it shall be lawful for the said Denys*, his executors, administrators and assigns, *to hold and enjoy the premises without interruption from the defendant;* That the interest which became due on the said mortgage, was regularly paid up to and on the 21st day of *December*, 1778; That the defendant *never had possession* of the house under the mortgage.—The question submitted to the court was,—Whether the plaintiff was entitled to recover, the rent which became due at *Christmas* 1779, from the defendant.

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Wood, for the plaintiff,—The only question is, Whether an action of debt will lie against the assignee of a lease before he takes actual possession? In the *first* place, it will certainly lie against an original lessee for years, before entry. This is settled by the case of *Bellasis* v. *Burbreck*(a), where it was held, that, in debt for rent, upon a lease *at will*, the plaintiff must shew *an occupation*, because the rent being due only in respect thereof, it must appear to the court when the lessee entered

(a) C. B. M. 8 *Will.* 3. 1 *Salk.* 209. S. C. 1 *L. Raym.* 170.

entered, and how long he occupied; but that, on a lease *for years*, entry or *occupation* need *not* be shewn, for, though the defendant neither enters nor occupies, he must pay the rent, it being due by the lease on contract, and not by the occupation. So in *Coke Littleton*(b) it is laid down, that a lessee for years before entry hath an interest which he may grant over to another. *Secondly*, In what respect does the situation of an assignee differ from that of the original lessee before entry? Is there more solemnity required in transferring property to any assignee than to a lessee? The assignment vests the complete interest of the lessee in the assignee. In *Cook* v. *Harris*(c), which was an action of debt for rent against the assignee of a term, it is said, by Lord HOLT, that the ancient method of pleading assignments was "*virtute cujus*" the assignee *entered* and was *possessed*, but that this method was now disused, for the assignee had the estate in him before entry. If he has the estate of the lessee in him, he must be liable to the same conditions to which the lessee himself was subject before entry. It is true, there is a *proviso* in this assignment that the lessee shall hold the premises till default shall be made in the payment of the interest, but still the whole *legal* property vested in the mortgagee from the time of the assignment, and the mortgagor became his mere tenant by sufferance, and might have been turned out by an ejectment without notice, as soon as there was a default of payment; which there was in this case before the rent now sued for became due. Suppose the premises had been underlet by the mortgagor; the mortgagee might have brought an action for the rent against the under-tenant, according to the late determination of this court in the case of *Moss* v. *Gallimore*(d). Suppose there had been an actual demise of the whole absolutely to the defendant, and he had made a separate under-lease to the mortgagor to continue till there should be a default in the payment of interest or principal, could there be any doubt that, in such case, the defendant would have been liable to an action for the rent? Here, the same thing has been done in substance, only by one instrument instead of two. This is very different from the case of a lease *for lives*, where livery of seisin is necessary, without which the delivery of the deed is not sufficient to give effect to the conveyance. By the very terms of the assignment, the defendant is made liable for the rent, and *subject to the covenants*.

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Rooke, for the defendant,—This is a question of great importance to all mortgagees. It amounts to this; whether a mortgagee of a lease for years, who has never taken possession,

(b) 46. b.
(c) *B. R. M.* 10 *Will.* 3. 1 *L. Raym.* 367.
(d) *M.* 20 *Geo.* *supra*, p. 279.

1780.

EATON against JAQUES.

sion, may be compelled by a stranger, to submit to all the conditions and covenants in the lease, although he is willing to wave all benefit from it. The inconvenience of such a doctrine would be monstrous. A mortgagee might lose his capital and interest, and also be compelled to pay rent, without deriving a farthing from the estate. But where is the hardship on the landlord if the action is not sustained? He has chosen his own lessee; he never depended on the credit of the assignee; and the only implied bargain he has made with the lessee relative to assignment, is, that if he lets another into the enjoyment of the estate, that person shall be liable. Is the defendant an assignee of that sort whom the law considers as liable? The plaintiff has declared that *all* the estate, right, title, &c. came to the defendant, and that by reason thereof, he became possessed. Is this true in fact? Lord HOLT's *dictum* in *Cook* v. *Harris* was extra-judicial, and, both before and since that time, all declarations in this court, against assignees, have stated entry and possession.—(BULLER, *Justice,* assented to this, and said it was so in all the courts.) —Here, there was no possession; and, besides, *all* the estate, right, &c. was not assigned, for the court will take notice of the difference between an absolute assignment, and one which is conditional, and made only to secure the payment of money. The point decided in *Moss v. Gallimore* was, that a mortgagee may distrain for the rent, before actual entry; but he must give notice of the assignment to the tenant, and by that act he avows, instead of waving his interest under the assignment. But the tenant could not compel him to enter, or re-[459]ceive the rent. I admit that debt lies against the original lessee, before entry, because, between him and the lessor, there is a privity of *contract*. But here there is not, nor any privity of *estate*, till possession. It will be asked, if the assignee can disavow the assignment or not, as he pleases, before entry? I answer, that, as between him and the assignor, he cannot, because of the privity of contract between them; but, as between him and other persons, he may.

Wood, in reply,—It does not appear, upon the case stated, that the mortgagee has waved all benefit of the mortgage. Indeed how could he wave it? It was his own fault to take it, and it cannot be surrendered but by a written conveyance. There is no distinction between an absolute and a conditional assignment with regard to the present question. Besides, when the mortgage was forfeited, the assignment to the defendant became absolute, and he then was complete owner. As to the possession alledged in the declaration, that is a mere inference of law, and is not traversable. It has been decided over and over again, that, if a deed is declared upon, and, after stating the deed, the declaration proceeds *virtute cujus,* &c. the deed only, not the subsequent part, can be traversed.

After

After the forfeiture, the mortgagee might have brought an ejectment, and might then have recovered the mesne profits from the time of the forfeiture.

Lord MANSFIELD,—In point of fact, this case must have existed for a century past, in a thousand instances; in this great town particularly, building leases have been, and are, perpetually mortgaged; and yet no instance has been found where the ground landlord has attempted to charge the mortgagee, not in possession, with the rent or covenants. This is a strong argument against the plaintiff, especially where the case is so hard, so unjust, and unconscionable. Numberless inconveniences would arise, if such a demand could be supported. The mortgagee never asks whether the rent is paid; he only looks to his security; and, when the principal and interest are paid, he re-assigns. But, if the plaintiff is right, a mortgagee might be called upon, years after such re-assignment, for arrears or breaches of covenant during the assignment: the consequences would be terrible. And all this arises from a mere slip in the attorney, in making the conveyance; for if he had made it an under-lease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee (a). Though no cases have been cited at the bar which apply to the present question, we have found two in *Vernon*, which I will state, that it may not be supposed, after this judgment, that they were overlooked.— The first is the case of *Sparkes* v. *Smith* (b). A bill having been filed against the mortgagee of a term, to compel him to discover whether the lease had not been assigned to him, and to perform the covenants, the court said, that, as the defendant was only a mortgagee, and never had been in possession, they would not assist the plaintiff to charge him, or decree him to perform the covenants.—The other case is that of *Pilkington* v. *Shaller* (c), which certainly cannot be supported; for the court, there, refused to relieve the mortgagee *because it was his own fault* to take an assignment of the whole term, and not an under-lease; but that is a very common ground of relief in equity.—These cases, therefore, leave the question as it stood upon the argument at the bar; and, there being no solemn well-considered decision, we must resort to principles. In leases, the lessee being a party to the original contract, continues always liable notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burthen while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not

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(a) *Holford* v. *Hatch*, *E.* 19 *Geo.* 3. *supra*, 183.

(b) *Canc. M.* 1692. 2 *Vern* 275.

(c) *Canc. T.* 1700. 2 *Vern.* 374.

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not liable. To do justice between men, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it was an absolute conveyance? It was a mere security [r 1]; and it was not, nor ever is, meant, that possession should be taken till default of payment, and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession, he could not have entered *vi et facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law. It was not an assignment *of all* the mortgagor's estate, right, title, *&c.*

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—It was admitted at *Nisi Prius*, that this was a new question [1]. I therefore could only form my opinion upon general principles, which I did in favour of the defendant, both from the justice of the case, and the constant form of pleading. But, the point being new, I thought it fit to be brought before the court, for their decision. It has been argued, at the bar, on a supposed analogy to different cases. The case of *Bellasis* v. *Burbreck (a)* makes rather against the plaintiff. Why is it there said that a lessee for years is liable, without entry? Because the rent is due *by him* in respect of the contract. But an assignee is only liable in respect of the thing enjoyed; and, therefore, the present case is more like that first put in that of *Bellasis* v. *Burbreck*, viz. the case of a lessee at will, who is only liable in respect of his occupation. The other authority mentioned on the part of the plaintiff is merely a *dictum* of Lord *Holt*, who was clearly mistaken as to the form of pleading; for I have looked into the precedents, and they always allege "*virtute cujus*" the assignee entered and *was possessed*. Besides, Lord *Holt* does not say that the assignee has the estate in him to *all* purposes before entry, and I admit, that, to *many* purposes, it passes by the delivery of the deed. For the reasons given by my Lord, I think

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[1] It appears that, in fact, in *Pilkington* v *Shaller*, a lessor had recovered at law against a mortgagee who had never been in possession; but it is probable no defence had been made.

(a) *Supra*, p. 457.

[r 1] See the case of *Rex* v. *Bulkely*, *suprà* 291, which was decided on the same principles; and see also the case of [illegible] v. *Ennis*, 2 *Vin. Ab.* 432, in which a contrary doctrine is maintained.

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think there is a great difference between an absolute and a conditional assignment, in the nature of the contract itself. In the one case the assignee has the substance; in the other only a shadow. But I do not agree with Mr. Wood, that if even the assignment were absolute, the action would lie, without possession. There is no instance. The distinction between a naked right, and the beneficial enjoyment, is founded in sound reason; and there are authorities in Danvers's Abridgment, Title Rent (b), where the court declared that the ground upon which assignees are made liable is because they have enjoyed the profits. I do not wonder that there are no old cases on this question; it is probably by means of the register act, which enables strangers to pry into other people's titles, that this mortgage has been discovered. But the question here being, whether mere nominal assignees with the naked right, or only substantial assignees in the actual enjoyment of the estate, shall be liable to this action, I think that only those of the last description are liable [F 2].

The *Postea* to be delivered to the defendant [1].

(b) Dan. 484.

[1] The following case was determined in this court, M. 22 Geo. 3.

WALKER v. REEVES.

Covenant for rent reserved upon a lease, by an assignee of the reversion against an assignee of the original lessee. The defendant pleaded two different pleas. The *first* was *demurred* to. In the *second* he stated, that, before the rent in question became due, he assigned *all* the estate, title, interest, and term of years which he then had to come in the premises, to one *Riggs*, *by virtue of which assignment Riggs* entered, and was, and still is, *possessed* thereof, &c. To this plea the plaintiff *replied*,

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[F 2] In *Jackson* v. *Vernon*, 1 *H. Bl.* 114, the defendant was vendee of a ship under an *absolute* bill of sale, and it appeared from other deeds between the parties that the bill of sale was for securing money, and that the vendee covenanted to re-convey on payment of the money so secured. It was there held that the substance of the transaction was a mortgage; and decided, on the authority of this case, that such vendee was not liable as owner for necessaries furnished to the ship, before the time of his taking possession. So in *Chinnery* v. *Blackburne*, *ibid.* it was held that the mortgagee of a ship could not recover for freight due before he took possession. In *Westerdell* v. *Dale*, 7 *T. R.* 306, Lord *Kenyon* expresses a dissent from this doctrine, that mortgagees out of possession are not chargeable, and particularly to the reason given by *Buller*, J. p. 458. *viz.* that entry and possession are always in such cases stated in pleading, for his Lordship says, he considers those "as mere formal words;" which also seems to be the inference from *Walker* v. *Reeves*, here cited. In the *Mayor*, &c. *of Carlisle* v. *Blamire*, 8 *East*, 487, it was attempted to carry the doctrine of the principal case one step farther, and to charge the

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replied, that, at and after the time when the rent in question became due, the defendant remained and continued *in possession* of the premises, without this, that the said *Rigge*, at any time before the rent became due, and in arrear, *entered into the premises*, and *was possessed thereof* The defendant *demurred* to this replication, and shewed for cause, that the plaintiff had therein traversed, and attempted to put in issue, matter of law only, and not any matter traversable or issuable. The case was argued, on *Tuesday*, the 9th of *November*, by *Bower*, for the plaintiff, and *Chambre* for the defendant. *Bower* relied on the case of *Eaton* v. *Jaques*, and contended, that it followed from the doctrine of the court there, that, till a second assignee enters and takes possession, the first continues liable to the rent and covenants. *Chambre* said it was unnecessary, and would be indecent, for him to controvert the case of *Eaton* v. *Jaques*, but insisted that the determination of that case turned principally upon the assignment appearing to be a mortgage and security for money, and not a substantial transfer of the property. That none of the reasoning in that case was applicable to an *absolute* assignment without entry, except the observation, that all the precedents aver actual entry and possession. But he insisted, that there were no instances of that averment having ever been traversed; and that was immaterial, like the allegation "*of being thereunto requested*" in actions of *assumpsit*, and many other averments as to time, place, *&c.* which are not traversable: he said, that, in both the cases in *Vernon*, cited by Lord *Mansfield* in *Eaton* v. *Jaques*, the court of Chancery took it for clear law, that covenant would lie against an assignee before entry; but that it was enough for him to shew that the defendant in this action was not liable he was not bound to prove that the last assignee was As to this he cited the same passage in *Coke Littleton* which *Wood* had done in *Eaton* v. *Jaques*, and also *Littl.* § 289: and 5 *Co.* 124 *b.* to shew what interest passes to a lessee before entry, and contended, that as large an interest must pass from a lessee to his assignee, or from one assignee to another, before entry, and therefore, in such cases, nothing more remained with the lessee or mesne assignee, but a mere naked possession, without any right, exactly as if he never had any other right. That this was not such a privity of *estate* as could support an action of covenant: and when the assignment had been made, as in the case

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the devisee of an equity of redemption (being in possession by receipt of rent), in an action of covenant as assignee of the estate of the covenantor. In answer to this, much objection was made in argument to the principal case and those cited from *H. Bl.*, but the court, in giving their judgment, although they held clearly that the mortgagor or his devisee was not liable to the action, declined to give any opinion whether the mortgagee out of possession would be liable.

In *Turner* v. *Richardson*, 7 *East.* 335, it was held that assignees of a bankrupt, not being liable to covenants until they have made their election whether to take to the property of the bankrupt or not, had not completed such election, and taken such possession of a leasehold as would be conclusive against them, merely by directing the lease to be put up to auction for the purpose of ascertaining the value, no person bidding at such auction.

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case before the court, not by an original lessee, but by a mesne assignee, it would follow, that as he had no privity of *contract* with the lessor, no ground would remain to support the action against him. *Bower* having said, that if mesne assignees could, by fraudulent and secret assignments, discharge themselves, and still retain the possession and enjoyment of the estate, it would be attended with great inconvenience to lessors. *Chambre* answered, that if the second assignment had been made fraudulently in this case, the fraud should have been averred, as was done in a case in *Vent.* 329. 331. *Anon.* He also mentioned *Lekeux* v. *Nash*, *H.* 18 *Geo.* 2. 2 *Str.* 1221. as another authority to shew that a fraud in the assignment cannot be taken advantage of unless it is pleaded.—The court took time to consider, and on *Friday*, 16 *Nov*, Lord *Mansfield* delivered their opinion. He said, they did not enter into the merits of the *first* plea, (and of which I have not taken any notice both for that reason, and because it was not at all applicable to the case in the text,) for that they were unanimous in thinking that the replication to the *second* was not good, unless it had gone farther, and charged the second assignment to have been fraudulent [F 3]. By the assignment, the title and possessory right passed, and the assignee became possessed in law. As to actual possession, that must depend on the nature of the property, whether it can take place. It might be a waste or unprofitable ground, as seemed to have been the case here.—(From the first plea it appeared to be ground meant to be built upon.)—This case was by no means like *Eaton* v. *Jaques*, for the assignment there, being a mortgage from the nature of the transaction, it was not an assignment to this purpose; it was a mere security; till the mortgagee called for his money, the mortgagor was to be left in possession, and to pay the interest; and it was not understood by either of the parties, that the mortgagee should be liable for the rent.

In point of fact, the last assignment in this case of *Walker* v. *Reeves* was only as a mortgage security. Therefore, if the plaintiff, instead of replying that *Riggs* did not take possession, had *traversed*, by his [463] replication, the allegation of the plea, that the defendant had assigned *all the estate*, title, interest, *&c.* and upon issue being joined, it had appeared on the trial, that the assignment contained a proviso of redemption, it should seem that he would have been entitled to a verdict, on the authority of *Eaton* v. *Jaques*.

[F 3] Such a replication was attempted in *Taylor* v. *Shum*, 1 *B.* & *P.* 21, without success; and it was held clearly that a lessee might assign to whoever he pleased, to get rid of his liability. *Eyre*, *C. J.* also doubted whether it were possible that there should be a fraudulent assignment, or any issue taken on such a point.

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Monday, 13th Nov.

The King *against* Adderley.

By the true construction of 20 *Geo.* 2. c. 37. § 2. a sheriff is not liable to be called upon to return process unless within six *lunar* months after the expiration of his office, and the day on which he goes out of office is not to be reckoned as part of the six months.

THIS was a rule to shew cause, why a *supersedeas* should not be granted upon an attachment issued against the defendant for not obeying a rule, to return a writ which had been directed to him when sheriff of *Warwickshire*. The facts of the case were; That the defendant went out of office on the 12th of *February* last, at four o'clock in the afternoon, and was not served with the rule in question till the 30th of *July* following. By 20 *Geo.* 2. c. 37. § 2. it is enacted, "That no sheriff shall be liable to be called upon "to make a return of any writ or process, unless he be *re*-"*quired* [☞] so to do within *six months* after the expiration "of his office," and a month in law is a lunar month, or twenty-eight days [F 1], unless otherwise expressed (*a*). *February* in this year, consisted of twenty-eight days, and, therefore, if the day on which the office expired was to be reckoned in to make up the six months, the rule was served a day too late, and the defendant was entitled to the protection of the statute.

On *Tuesday*, the 7th of *November*, the case was argued, by the *Attorney-General* and *Wheeler*, in support of the rule, and by *Dunning*, on the other side.

Three questions were made, viz. 1. Whether the day of quitting the office should be considered as included in the six months, or excluded? 2. Whether the proceeding by *attachment* was not irregular, the defendant being no longer an officer of the court, and whether the process ought not to have been a *distringas*? 3. Whether the defendant, if not protected by the statute, must pay a fine equal to the whole debt, or whether he was not entitled to relief, upon equitable circumstances to be laid before the court by affidavit?

1. On

[☞] It is not sufficient for the party to require the sheriff to return the writ; he must have been served with a rule of court for that purpose within the six months, otherwise an attachment cannot issue against him. The only way to require him to return is by a rule and process of the court. *R.* v. *Jones*, B. R. T. 27 *Geo.* 3. 2 *Term Rep.* 1.

(*a*) 2 *Black. Comm.* 141.

[F 1] In *Lacon* v. *Hooper*, 6 *Term Rep.* 224, this was declared to be a rule of construction so established as not to be shaken; though Lord *Kenyon* regretted that it had been originally so decided. S. P. admitted in *Glassington* v. *Rawlins*, cited in the next note.

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The King against Appleley.

1. On the *first* question, the court were, at first, of opinion, that the day on which the old sheriff quits his * office was not to be reckoned in the six months; for there is no fraction of a day, and he might be called upon to act in the course of that day.

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2. As to the *second* question, it was argued, on the part of the defendant, that the same practice ought to obtain with regard to rules to return writs, and rules to bring in the body, and that, in the latter cases, the proceeding against the old sheriff is always by *distringas*. The master, however, on being referred to by the court, certified, that a difference had always prevailed, and that for not obeying a rule for returning a writ, the constant course is to proceed by attachment; and Buller, *Justice*, stated a reason for the distinction, for he observed, that the writ in strictness, ought to have been returned before the old sheriff was out of office, and therefore the contempt was actually committed while he was a servant of the court.

3. With regard to the *third* question, Lord Mansfield said, he did not recollect any instance where the court had exercised an equitable jurisdiction in such a case as this, by enquiring into the actual damage sustained by the default of the defendant, and compelling him to make satisfaction only to that extent. The master then referred to, said he knew of no such instance; but Buller, *Justice*, seemed to consider, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt, though, in order to proportion it to the actual damages, he thought they must be ascertained by a jury.

Lord Mansfield then observed, that this question was not then before the court; and Ashhurst, *Justice*, having proposed that the attachment should lie in the office for 10 days, with liberty for the defendant to apply, in the mean time, to have it set aside upon terms, a rule was pronounced to that effect.

Afterwards, on this day, Lord Mansfield delivered the opinion of the court, as follows:

Lord Mansfield.—We have altered our opinion on this case, upon grounds which I will mention. The old sheriff, on the 14th of *February*, turned over, by indenture to his successor, all un-executed process (a). The act, by its title, purports to be made *for the ease of sheriffs* with regard to the return of process. We find, in the case of *Bellasis* v. *Hester*, reported by Lord *Raymond* (b), that it is laid down

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by

(a) 20 Geo. 2. c. 37. § 1.

(b) B. R. M. 9 Will. 3. 1 Ld. Raym. 280.

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by the majority of the court, that where the computation is to be made *from an act done* [F 2], (as from the sight of a bill of exchange by the acceptor, which was the case there), the day when such act was done is to be included. Now here the act of quitting the office by turning over the writs, &c. to the new sheriff was done by the defendant on the 12th of *February*. So, in the case of *Norris* v. *The Hundred of Gautris*, mentioned in *Rolle's Abridgment* (c), and reported in 1 *Brownlow* (d), which was an action on the statute of *Hue & Cry*, the robbery was laid, and proved to have been, on the 9th day of *October*, 13 *Jac.* 1. and the writ was tested the 9th of *October*, 14 *Jac.* 1. and the words of the statute of *Elizabeth* (e) being, "That no person shall take any "benefit, &c. except he or they so robbed shall commence "his or their suit or action within one year next *after such* "*robbery*, &c." (f), it was held, that the day when the robbery was committed, was to be included in the year, and that the action was brought too late; and judgment was arrested after verdict. The words of the statute of 20 *Geo.* 2. are the same as those of 27 *Eliz.* and this being a penal proceeding against the defendant, who is intitled to the most favourable construction of a statute expressly made for the ease of sheriffs, we think the day of his leaving the office is to be computed as part of the six months, and, therefore, the rule to return the writ came too late.

The rule for a *supersedeas* made absolute.

(c) 2 *Roll. Abr.* 520. *pl.* 8.

(d) 1 *Brownl.* 156. *S. C.* more fully reported *Hob.* 139.

(e) 27 *El.* c. 13.

(f) § 9.

[F 2] This doctrine was confirmed on the authority of the present case in *Castle* v. *Burditt*, 3 *T. R.* 623, in which it was held, under a statute enacting that no writ should be sued out until one calendar month next after notice, such notice having been served on the 28th of *April*, that a writ sued out on the 28th of *May* was not too soon. Also in *Glassington* v. *Rawlins*, 3 *East.* 407, where it was decided that the day of arrest must be taken into account, in calculating the two months that a trader must lie in gaol, in order to make him a bankrupt under 21 *Jac.* 1. c. 19. s. 2.

The KING *against* BARRAT.

Monday, 13th Nov.

If a parish-officer make an alteration in a poor-rate, after it has been allowed by two justices, but with the approbation of the justices, he shall not be punished by information.

THIS was a rule to shew cause, why an information should not be filed against the defendant, as one of the overseers of the poor for the borough of *Stockbridge*. The offence charged by the affidavits was, that, after the poor-rate had been signed by the parish-officers, and allowed by the justices, the defendant had altered it, by interlining an article of one *Geary* for a tenement in the borough. It appeared that *Geary's* landlord, * (since one of the members returned for the borough,) had been rated for this tenement for the two preceding years, and the prosecutor swore that he believed the alteration was made to serve election purposes.

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On the other side, it appeared, that the defendant had the concurrence of the other parish-officers, and the permission and approbation of the justices, and he positively swore that he had not acted with any view to election purposes. It also appeared that there was no vacancy at the time; that the rates are made at *Stockbridge* every month; and that *Geary's* name had been inserted in a subsequent rate, which was made previous to the election, and had been suffered to remain without any appeal.

Lord MANSFIELD said, that, in granting informations, the court always looked to the motive: that, the defendant had acted improperly, but with the sanction of the magistrates' approbation, it was very natural for him to fall into such a mistake, and he denied positively having acted with any view to election purposes, which indeed the circumstances shewed could not have been answered by what he had done: the crime, if any, was in the justices, and they ought to have been the objects of the application: however, as the conduct of the defendant was irregular, the court would not discharge the rule with costs.

Dunning, and *Lee*, in support of the rule. The *Attorney-General*, *Widmore*, and *Burton*, for the defendant.

The rule discharged.

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Wednesday, 15th Nov.

HAWKINS *against* MAGNALL.

The keeper of a prison cannot be bail [F 1].

BOWER opposed one of the bail in this cause, on the ground of his being the *Keeper* of the *Poultry Compter*. *Baldwin*, on the other side, contended, that the rule prohibiting officers from becoming bail, extends only to those of the court where the action is brought; but BULLER, *Justice*, said, there was no such distinction [† 103], and, though *Bower* was afterwards instructed to wave the objection, the court declared they must reject the bail, to preserve the uniformity of practice [1].

[† 103] *Vide Bolland* v *Pritchard*, *C. B. H.* 12 *Geo.* 3. 2 *Blackst* 799.

[1] By the rules and orders of *B. R. M.* 1654. § 1 "It is ordered, "that, for the *prevention* of *maintenance* and *brocage*, no *attorney* be "lessee in an ejectment, nor *bail for* a "defendant, in this court, [467] "in any action." There is also a similar rule in the same words among those of *C. B.* of the same term, § 1 [☞]. In a case of *Boulogne* v. *Vautrin* [†104], *B. R. T.* 18 *Geo.* 3 the clerk to the defendant's attorney was tendered as bail, and objected to, by *Douglas*, of counsel for the plaintiff, as being within the reason, though not the words, of the foregoing rule, and the court being of that opinion, he was rejected —But if a person, who by the rules of the court is not permitted to become bail,

[☞] And by a rule of that court, *M.* 6 *Geo.* 2. It is ordered, that no attorney of this, or any other court, or any practising as such, shall be bail in any suit or action depending in this court. And on the construction of that rule, the court held in *Laing* v *Cundale*, *C B M.* 29 *Geo.* 3 *H Bl* 76, that it extends to the articled clerks of attorneys. But, in a criminal case, the defendant's attorney may be bail for him. Thus in *Rex* v. *Bowes*, the defendant was carried down to *Bedford* assizes, *Aug.* 1787, under a rule of court, before ASHHURST, *Justice*, to give bail on articles of the peace exhibited against him by his wife, Lady *Strathmore*. One of the bail was objected to as being his attorney; but ASHHURST, *Justice*, held that the rule did not apply in criminal cases. However, the other bail appearing insufficient, the defendant was remanded.

[† 104] Since reported, *Cowp.* 828.

[F 1] *Contrà Faulkner* v. *Wise*, 1 *B*[illegible] 150: where a person, described as "of *Banbury* in the county "of *Oxford*, gaol-keeper," was allowed to justify by affidavit, the court saying, that he might be a corporation gaol-keeper, and have nothing to do with the *process of that court*; which, it appears, from the rule of C. B. *Hil.* 6 *G.* 2. *s.* 7, there cited by the reporters, is the ground of rejection. The present case was not mentioned to the court.

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HAWKINS against MAGNALL.

bail, shall be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in. This was determined in *B. R. E.* 22 *Geo.* 3. *Sat.* 27 *Apr.* in a case of *Thomson* v. *Roubell.*—The attorney for the defendant [¶ 2] was one of his bail. The plaintiff did not except, but. considering the bail-piece as a mere nullity, took an assignment of the bail-bond, and brought an action upon it. *Mingay* moved to stay the proceedings, and the court held that the assignment was irregular, for that the bail-piece was not void; the attorney, although he ought not to have been bail, and was punishable by the court, being liable to the plaintiff, who, by not objecting, had accepted his security. *Bower* for the plaintiff [† 105].

[† 105] *Vide Jackson* v. *Trinder*, *C. B. H.* 18 *Geo.* 3. 2 *Blackst.* 1180.

COPE and Another *against* COOKE.

Wednesday, 15th Nov.

It is not sufficient for the plaintiff, in an affidavit to hold to bail, to swear that the defendant is indebted to him in so much *upon promises*.

ON *Thursday*, the 9th of *November*, *Mingay* had obtained a rule to shew cause, why the defendant should not be discharged, on filing common bail, on the ground that the affidavit on which he had been arrested, did not state the nature of the demand with sufficient certainty. The words were, " That the defendant was indebted to the plaintiffs *in* £200, " *upon promises*."

Bower, this day, shewed cause, and said, that all the statute (*a*) had been construed, (in the different cases,) to require, was that the fact of the debt being due should be stated with certainty, not argumentatively, and by reference to evidence. That, in this particular case, the circumstances were long and complicated, (the action being a special *assumpsit* on an undertaking relative to the sale of a chance in the *Irish Lottery*,) and it would have been impossible to set forth the ground of the demand without stating the whole substance of the declaration. He admitted that the original affidavit could not now be *amended*, nor its defects supplied by a supplementary one [† 106].

The

(*a*) 12 *Geo.* 1. *c.* 29. § 2.

[† 106] *Vide Reeks* v. *Groneman*, *C. B. H.* 4 *Geo* 3. 2 *Wils.* 224. ☞ But by the present practice of the court of *C. B.* it should seem that such supplemental affidavit may be filed. *Hobson* v. *Campbell*, *C.B.T.* 29 *Geo.* 3. *H. Bl.* 245. 249.

[¶ 2] In *Fenton* v. *Ruggles*, 2 *B. & P.* the court, notwithstanding the authority of this case, refused to stay proceedings in an action on the bail-bond, where an assignment had been taken under circumstances exactly similar.

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COPE against COOKE.

The court were of opinion, that the affidavit was too general, but would not allow the defendant the costs of the application, which Mingay had moved for.

The rule made absolute [☞*].

[☞*] So an affidavit that the defendant is indebted to the plaintiff "in "£23 in trover," is bad. *Hubbard* v. *Pacheco*, C. B. E. 29 Geo. 3. H. Bl. 218. *Vide* also *Sheldon* v. *Baker*, B. R. H. 26 Geo. 3. 1 Term Rep. 83. *Davis* v. *Mussinghi*, B. R. E. 27 Geo. 3. 1 Term Rep. 705. *Mackenzie* v. *Mackenzie*, B. R. E. 27 Geo. 3. 1 Term Rep. 716.

Saturday, 18th Nov.

LOWRY and Another *against* BOURDIEU.

An insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe.

THE plaintiffs had lent to *Lawson*, captain of the Lord *Holland East Indiaman*, £26,000, for which he had given them a common bond, in the penal sum of £52,000. While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from *China* to "*London*, beginning the adventure, *upon the goods* from the "loading thereof on board the said ship at *Canton* in "*China*, &c. *upon the said ship*, &c. from and immediately "following her arrival at *Canton* in *China*, valued at "£26,000, being the amount of captain *Patrick Lawson's* "common bond, payable to the parties as shall be described "on the back of this policy; and it bears date the 16th day "of *December*, 1775; and, in case of loss, no other proof "of interest to be required than the exhibition of the said "bond: warranted free from average, and without benefit of "salvage to the insurer."—At the head of the subscriptions was written, "*On a bond as above expressed.*"—Captain *Lawson* sailed from *China*, and arrived safe with his privilege, (as it is called,) or adventure, in *London*, on the 1st of *July*, 1777, none of the events insured against having happened. The receipt of the *premium* was acknowledged on the back of the policy. In 1780, the insured brought this action for a return of the *premium*, on the ground that, the policy being without interest, the contract was void. The cause came on before Lord MANSFIELD, at *Guildhall*, at the Sittings after the last *Trinity Term*, when his Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo.* 2. *c.* 37, and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis* was applicable to the case, and the plaintiffs could not recover the *premium*. A verdict

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verdict was accordingly found for the defendant, agreeably to his Lordship's direction; but the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement which *could never have been completed; and, the first day of this term, *Bearcroft* obtained a rule to shew cause, why a new trial should not be granted. He insisted, that the contract was to be considered as executory in its nature, the *premium* having been paid before the risk commenced.

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This day, cause was shewn, by the *Attorney-General*, *Cowper*, and *Dunning*.

They contended, that, in truth, and substantially, the plaintiffs had an insureable interest. That, though this was, in form, a policy on the ship and goods, yet the bond was stated, in the very body of the policy itself, as the real interest of the insured. If there was no insureable interest, yet, as the plaintiffs paid the money with their eyes open, and not under any mistake of the law; as they expressly stipulated that the bond should be, between them and the underwriters, the only proof of interest that should be required, or, in other words, that it should pass for interest, as between them, whether the law considered it as such or not; as they most undoubtedly would have called upon the defendant if the ship had been lost; the court will not assist them in recovering the *premium*, although paid upon an illegal consideration. It may be said that, in case of a loss, the law would not have compelled the underwriters to pay. *That* may be true; but it would have been dishonourable in them to refuse, and the principle in such cases is, that the court ought to remain neutral. If the underwriters had, in fact, paid, the court would not have assisted them in recovering back their money, in an action for money had and received. Many cases of the same sort were mentioned by Lord MANSFIELD at the trial, where money, the payment of which could not have been compelled by law, having been actually and voluntarily paid, it cannot be recovered back in an action; as, for instance, money paid by an infant, or on *time-contracts* for the price of stocks. As to the payment of the *premium*, though there is a receipt for it on the policy, yet it is well known that, in point of fact, it is never paid at the time of underwriting, but remains an article in the current account between the broker and the underwriter.

Bearcroft, on the other side, argued, that as the plaintiffs could not have recovered for the loss, and had made the insurance under a mistake of the law, not with an intention to act against it, they ought to recover back the *premium*, as paid without any consideration. It happens every day that the *premium* is recovered back when it has been paid upon a mistake in point of law, if no fraud or illegal intention appears.

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pears. The parties here were guilty of a blunder, and nothing more. If they had intended a fraud upon the statute, they would not have stated the nature of their supposed interest in the very policy itself. There are cases where even on a policy clearly illegal the *premium* has been decreed to be paid back, in a court of equity. In *Willingham* v. *Thornborough* (a), upon a bill brought to be relieved against an illegal policy, the court made it a condition that the plaintiff should return the *premium*. If it is said, that the reason of that decision was, that it is a rule in courts of equity never to give relief, even in cases of gross fraud, without ordering what is really due on either side to be paid, that rule will apply, and ought to govern, in the present case, for this court has often said, that mercantile questions ought to be decided in the courts of law according to equitable principles.

Lord MANSFIELD.—It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue [F 1]. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say, "We mean to game; but "we give our reason for it; Captain *Lawson* owes us a "sum of money, and we want to be secure in case he should "not be in a situation to pay us." It was a hedge. But they had no interest; for, if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been intitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the court will not interfere to assist either party: according to the well known rule, that in *pari delicto, &c.* Not that the defendant's right is better than that of the plaintiffs, but they must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark by taking too long an aim.

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WILLES, *Justice*,—I shall make no apology for differing from the rest of the court, in a case where such great abilities have

(a) *Canc. H.* 1690. *Prec. in Chanc.* 20.

[F 1] See *Crawford* v. *Hunter*, 8 *T R.* 13, and *Lucena* v. *Crawford*, 3 *B* & *P.* 75.

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have entertained two different opinions. The *premium* has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had an idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake, but it is a new point of law. The case cited from *Precedents in Chancery* is not perhaps decisive, but it goes a great way, and it would be very hard that a party should lose what he has paid under a mere mistake. I think in conscience the defendant ought to refund the *premium*.

ASHHURST, *Justice*,—I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity and nothing more [illegible] the money might have been paid twice [illegible] this was a gaming policy.

BULLER, *Justice*,—It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor [illegible] in matter of [illegible]. If the *law* was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy [illegible]. There is a sound distinction [illegible] executory [illegible] contract [illegible] tory [illegible], and then [illegible] the [illegible]

[illegible]

[F 2] So where [illegible] document had been concealed at the time of making an insurance, and plaintiff, an underwriter, had paid the amount of his subscription, it was held that he could not recover it back, because, before the adjustment, that document, with other papers, had been laid before the underwriters; notwithstanding plaintiff might be ignorant, when he paid, that the concealment afforded in law a defence to an action on the policy. *Bilbie* v. *Lumley*, 2 *East*. 469.[3] Otherwise if the assured be ignorant of a *fact*. *Oom* v. *Bruce*, 12 *East*. 225.

[F 3] In *Munt* v. *Stokes*, 4 *T. R.* 561, it was held, that where executors had paid money borrowed by their testator, upon an illegal loan, they could not recover it again in an action for money had and received; [illegible] *Buller*, J. referred to this case [illegible] establishing the distinction [illegible] *Cotton* v. *Thurland*, 5 *T. R.* [illegible] where money had been [illegible] defendant's hands as a stakeholder, to abide the event of a battle, [illegible] paid over to the winner, the court held it might be recovered by a [illegible] wager, the contract between [illegible] and defendant being still executory [illegible] expressly overruled, *Cowan* v. *Milder*, a contrary *nisi prius* decision of *Wilson*, J. In a subsequent case of *Lacaussade* v. *White*, [illegible] *R.* 535. the court certainly acted on grounds contrary to

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storing the other party to his original situation. There was a case of *Walker* v. *Chapman*, some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money having brought his action to recover it back; it was held, that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk, (such as it was, not indeed founded in law, but resting on the honour of the defendant), had been completely run. It makes no difference whether the *premium* was paid before the voyage, or after it.

The rule discharged [☞].

[472] Lord MANSFIELD said, he desired it might not be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered

[☞] *Vide Andree* v. *Fletcher*, *B. R.* *E.* 29 *Geo.* 3. 3 *Term Rep.* 266, where it was held that a *premium* paid, on a re-assurance void by 19 *Geo.* 2. *cap.* 37, cannot be recovered back.

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this distinction between contracts executory and executed, and to the authority of the principal case; refusing there a rule for a new trial, where plaintiff had recovered, under the count for money had and received, the premium paid by him on a war policy, after the event had happened which was to decide the wager. But, in *Howson* v. *Hancock*, 8 *T. R.* 575. they appear to have reverted to the former principle, deciding that after an illegal wager had been paid over to one of the parties, it could not be recovered against the stake-holder; and Lord *Kenyon*, referring to *Lacaussade* v. *White*, considers it maintainable on a ground that does not appear to belong to it, viz. that it was money recovered from a stake-holder. *Per Lawrence*, J. 8. *East*. 381. *in not.* See *acc.* *Vandyck* v. *Hewit*, 1 *East*. 96. where the court held, that after a loss by capture in a smuggling transaction, the assured could not recover the premium. And *Morck* v. *Abel*, 3 *B. & P.* 35. where the same point was decided against a plaintiff, who was a *foreigner*, though the illegality of the voyage arose only from certain provisions of the navigation act, which had been much relaxed in practice. See also *Shiffner* v. *Gordon*, 12 *East*. 296, and the cases there cited. Also *Lubbock* v. *Potts*, 7 *East*. 449. Also *Tappenden* v. *Randall*, 2 *B. & P.* 467, in which the plaintiffs recovered the consideration money paid for a bond conditioned to pay an annuity, until the hop duties should amount to a certain sum; such event not having happened, and nothing having been paid on account of the annuity. In *Aubert* v. *Walsh*, *C. B. M.* 51 *G.* 3. which was an action to recover the premium paid on a war policy, brought before the event had happened, the court took a full view of all the cases here cited; and determined that the plaintiff was entitled to recover, upon the distinction taken by *Buller*, J. in the principal case.

vered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto* (a).

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(a) *Vide Jones* v. *Barkley*, *T.* 21 *Geo.* 3. *infra*, p. 695. *Note* [3]. *Smith* v. *Bromley*, *N. Pr. E.* 1760. *infra*, 696.

Brown *against* Rivers.

Saturday, 18th Nov.

If a person who has been discharged by an insolvent act brings an action, and recovers, on a promissory note made payable to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for his assignees.

THIS was an action of *assumpsit* brought by the plaintiff as payee of a promissory note, drawn by the defendant, for £45, bearing date the 1st of *November*, 1777, and payable to the plaintiff, or his order, twelve months after date. The plaintiff had pledged his note with one *Crowe*, for £20. In *November*, 1777, the plaintiff was arrested and imprisoned, and, in *June*, 1778, was discharged under the insolvent act of 18 *Geo.* 2. *c.* 52. This note was not inserted in the schedule of his effects delivered in at the time of his discharge (a). There was an indorsement on it by the plaintiff in favour of *Crowe*, and some dispute arose between the counsel, whether this indorsement was made prior or subsequent to the imprisonment, but it was admitted that the note was pledged before the imprisonment. The declaration stated the insolvency of the plaintiff, his discharge, and that the note not being paid when it became due, he had, after his discharge, redeemed it from *Crowe*. The cause was tried before Lord Mansfield, at the Sittings after last *Trinity Term*, and a verdict found for the plaintiff, with damages to the full amount of the note.

On *Wednesday*, the 8th of *November*, *Morgan* obtained a rule to shew cause, why the verdict should not be set aside, and a nonsuit entered; and, this day, the case was argued, by the *Attorney-General*, for the plaintiff, and *Dunning* and *Morgan*, for the defendant.

On the part of the defendant, it was contended, that, by the operation of the statute, § 14. this note became vested in the clerk of the peace, and, by his assignment, in the assignees; that the plaintiff had no longer any interest in it, and could not maintain the action.

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On the other side, it was said, that the plaintiff had an interest in the note, to the amount of the £20, and the action could not be split. *He* could not sue for that sum, and the

(a) 18 *Geo.* 2. *c.* 52. § 12.

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the assignees for the balance. Parties having different portions of interest in a note, cannot bring separate actions. The plaintiff was entitled to recover the whole, but would be a trustee for his creditors as to the balance beyond the £20.

Lord Mansfield,—As between the plaintiff and defendant there can be no doubt. The plaintiff must recover the whole, and pay over, what exceeds the sum he has advanced since his discharge, to his assignees.

The rule discharged.

Tuesday, 21st Nov.

Den, Lessee of Taylor, *against* The Earl of Abingdon.

Upon an *elegit* the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making *in value* a moiety of the whole.

THE lessor of the plaintiff having recovered a judgment against the defendant, sued out an *elegit* of his lands in the county of *Berks*, upon which an inquisition was taken, and returned by the sheriff; and this ejectment was brought to obtain possession under the *elegit*. The cause came on for trial before Perryn, *Baron*, at the Summer Assizes for *Berkshire*, on *Tuesday*, the 25th of *July*, 1780, and the inquisition being produced, it appeared, that it mentioned by name all the different farms and tenements of the defendant's estate in the county consisted, with their value, the number of acres in each, be the same more or less, the tenants' names, yearly value besides reprizes, and the clear yearly amount of the whole; and then, repeating the names of a certain number of them, their number of acres more or less, and yearly amount, it found that those particular farms and tenements were a true and equal moiety of all the said lands and premises of the defendant in the county, "which moiety of the "said lands and premises, I, the said sheriff, on the day of "taking this inquisition, have caused to be delivered to the "lessor of the plaintiff, by the price and extent aforesaid, "&c." Upon the production of this inquisition, *Cowper*, on

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the part of the defendant, objected, that the *elegit* had not been duly executed, and that the inquisition was void on the face of it, for that a moiety of each farm ought to have been extended and delivered to the lessor of the plaintiff, and not a certain number of distinct farms, amounting, in value, to a moiety of the whole. This objection being stated, and a passage in *Gilbert's Evidence* (a), taken from *Ventris* (b), cited in support of it, the Judge, and counsel on both sides, agreed that a case should be saved, setting forth the inquisition,

(a) 54. (b) 1 *Vent*. 259.

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tion, in order to take the opinion of the court; subject to which opinion a verdict was found for the plaintiff.

Two days afterwards, a similar cause, between the same parties, came on, before BULLER, *Justice*, at *Oxford*, and a case was also saved in that cause, which was to abide the decision of the court on the former.

This day the question was argued, by *Baldwin*, for the plaintiff, and *Cowper*, for the defendant.

Baldwin contended, that the method in which the writ had been executed, and the inquisition taken, was entirely consonant to the statute of 13 *Edw.* 1. *stat.* 1. *c.* 18. by which the process by *elegit* was introduced. The words of the statute are, "The sheriff shall deliver to, (the plaintiff,) all the "chattels of the debtor, (save only his oxen, and beasts of "his plough,) and *the one half of his land*, until the debt be "levied, upon a reasonable price or extent." There is nothing in these words that imports that the moiety of each farm or field is to be extended. Their natural sense is, that a moiety in value shall be delivered. The words of the writ pursue exactly those of the statute; and all the precedents in the books of practice, from *Rastall* to *Lilly*, resemble the inquisition in the present case (*c*). In some instances they do not even mention the particular lands. In *Brooke's Abridgment*, Title *Elegit* (*d*), it is expressly laid down, "That, if "*elegit* issue against one who hath two manors, the sheriff "may deliver one of the manors to the plaintiff, in the name "of a moiety of the whole, and is not bound to deliver a "moiety of each manor; and so of two acres; and this "seems to be when they are of equal value." The only case to be found, which seems to warrant the doctrine contended for on the part of the defendant, is that of Lord *Stamford* v. *Nedham*, in *Levinz* (*b*). The report of that case by *Levinz* [475] is very short and imperfect, but it seems to be the same which is reported, under a different name, *viz.* Lord *Stamford* v. *Hobart*, in *Siderfin* (*c*); for *that* is mentioned as of the same year and term; and, by that account of the case, it appears, that the only question was upon a suggestion that there had been a false return made to the *elegit*, and on the manner in which the defendant could get rid of it. It is true, that, in a variety of cases, it is laid down, that, upon an *elegit*, the sheriff must set out the moiety delivered, by *metes and bounds*. Thus in *Pullen* v. *Birkbeak*, reported in *Carthew* (*d*), Lord *Holt*

(*c*) *Rast.* 262. *Clift.* 877. 883. *Townsh. Judgments* 1. 17. 33. *Lilly* 574.

(*d*) *Pl.* 14. 12 *Edw.* 4. 2.

(*b*) *B. R. H.* 16 & 17 *Car.* 2. 1 *Lev.* 160.

(*c*) *B. R. H.* 16 & 17 *Car.* 2. 1 *Sid.* 239.

(*d*) *B. R. T.* 10 *Will.* 3. *Carth.* 453.

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Holt says, "If, upon an *elegit*, the sheriff delivereth a moiety "of a house without *metes and bounds*, such return is ill." In that supposed case, as there are not two houses of equal value, certain part or rooms, equal in value to a moiety, must be set out; but the reason given by *Holt*, *viz.* that the return is ill for the *uncertainty*, shews that the only object of the *metes and bounds* is to ascertain and distinguish the parts extended and delivered in execution. There is a case in *Hutton* (e), to the same purpose. But there is no decision, nor *dictum*, except the case in *Levinz*, which authorizes the opinion that a moiety of each particular field, or farm, must be extended. The great inconvenience which would attend such a method of executing the writ is extremely obvious.

Cowper relied on the case in *Levinz*, as directly in point; and insisted, that the plain interpretation of the words of the statute were in his favour.

Lord MANSFIELD having asked him, what he said to the precedents, he answered, that he conceived they were no authority [1]; and, besides, that they differed from one another.

Lord MANSFIELD,—Mr. *Baldwin*, you need not reply: the reason of the thing is strongly with the practice, and in your favour.

BULLER, *Justice*,—There are many other cases, besides what have been cited, which shew that the inquisition and return are good, although separate lands have been extended, provided it does not appear that they amount in value to more than a moiety of the whole; 1 *Salk*. 563. 1 *Sid*. 91. *Cro. Car*. 319. Mr. *Cowper*'s argument goes not only to every farm, but to every close and field. In short, the writ could not be executed according to his idea, but by delivering an undivided moiety. Yet most clearly that is not the meaning of the statute, for it is agreed the moiety extended must be set out by *metes and bounds* [1]. I take the meaning to be, a moiety in value; which is ascertained by the jury.

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The *Postea* to be delivered to the plaintiff.

(e) 16.

[1] In the case of *Buckley* v. *Rice Thomas*, upon a demurrer, an *entry* in the old book of entries is cited, and relied on, by *Brooke*, Ch. J. and *Saunders*, J. as *an authority* to shew the proper form of declaring in an action for a false return, under 23 *H*. 6. c. 15. *Plowd*. 118. 126. 129.

[1] "L'execution per force d'un "*elegit* serra fait del moyety *per metas* "*et boundas*, and nemi, *per mie & per* "*tout*." *Dalt*. 135. cites 31 *Ass*. but I can find no such passage in the Book of *Assize*. The case in 1 *Vent*. 259. (*supra*, p. 474. *Note* (*b*),) which is referred to by *Gilbert*, was not cited upon the argument. There was no decision in that case, the court differing in opinion; and the only question was, whether the return could be quashed *upon motion*, it not appearing that possession had been delivered by *metes and bounds*.

JEFFERY *against* WHITE.

Tuesday, 21st Nov.

If oyer is granted of any instrument of record, and it is set forth, although the party was not intitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea.

TRESPASS for taking cattle; *Plea*, That they were taken damage feasant; *Replication*, a right of common; *Rejoinder*, stating, by way of inducement, part of a private act of parliament for inclosing the common, and an allotment, by the commissioners, of the *locus in quo* to the defendant, and traversing the right of common; *Oyer* prayed of the act, and granted; the whole act set forth; and then, *Demurrer* to the rejoinder; and cause assigned, that it was not shewn by the rejoinder that the allotment had been made according to the directions of the act as set forth; *Joinder* in demurrer.

Bower, for the plaintiff.—*Lawrence*, for the defendant.

For the defendant, it was argued, that a party is not entitled to *oyer* of acts of parliament, and that it cannot be granted, because they are not in the power of the court; and, for a similar reason, the party who relies upon them, cannot make *profert*, because he has them not to produce. That the plaintiff ought to have pleaded the record of the act, in a *sur-rejoinder*, and thereby have given the defendant an opportunity to take issue upon it. That by the plaintiff's setting it forth upon the *oyer*, and then demurring, the defendant was precluded from that advantage, and the plaintiff enabled to state it in whatever manner he pleased. That the court, therefore, ought to consider the *oyer* and recital of the act, as a mere nullity; and that, upon what appeared in the defendant's rejoinder, the allotment was regular, and therefore the defence was sufficient.

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Bower admitted, that *oyer* could not be compelled of an act of parliament [☞]; but insisted, that, as it had been in fact granted, the party who had demanded it was entitled to consider the whole of what was set forth as making part of his adversary's plea. For this he cited 6 *Mod.* 27. 1 *Saund.* *316, 317. and other authorities.

Judgment for the plaintiff.

[☞] Nor of a record, as letters patent inrolled in *Chancery*. *Rex.* v. *Amery*, *B. R. H.* 26 *Geo.* 3. 1 *Term. Rep.* 149.

1780.

Wednesday, 22d Nov.

GOODRIGHT, Lessee of HARE, Widow, *against* CATOR and Others.

An estate being conveyed by a marriage settlement to trustees, to the use of the settlor *for life*, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke *all* the uses in the settlement, and the settlor having granted an estate *for his own life*, in the settled estate a revocation subsequent thereto, *of all the uses*, by him, with the consent of the trustees, shall not affect the estate granted for his life.—*Actual* entry is not necessary to take advantage, by ejectment, of a [illegible] a lease to re-enter for non-payment of rent.

THIS was an ejectment brought to recover the possession of certain lands in the county of *Kent*. Upon the trial, the jury found a special verdict, which set forth, (as far as is material to be stated,) as follows:

That Lord *Bolingbroke* was seised in fee, *(inter alia,)* of the premises mentioned in the declaration: That, by indenture bearing date the 7th of *September*, 1757, reciting, *(inter alia,)* an intended marriage between him and Lady *Diana Spencer*, in consideration of such intended marriage, and for other considerations therein mentioned, his Lordship covenanted with Lord *Pembroke* and Lord *Guilford*, parties thereto, that, in six months after the solemnization of the marriage, he would convey to the use of *I. S.* and *W. B.* also parties thereto, certain manors, lands, &c. therein mentioned, for 99 years, for the purpose of raising a certain yearly sum for the separate use of Lady *Diana*, during her and Lord *Bolingbroke*'s joint lives; remainder to the use of Lord *Bolingbroke* for his life, without impeachment of waste, remainder, after his death, to trustees, for 500 years, without impeachment of waste, to the use and intent that Lady *Diana should take and enjoy a certain yearly rent, during her life, for her jointure, and upon other trusts; remainder, after the determination of such term, to the first and other sons of the marriage, in strict settlement, with remainders over; That the premises in question were part of those contained in the said indenture; That in the same month of *September* 1757, the marriage took effect; That by indentures of lease and release, of the 3d and 4th of *November*, 1765, in pursuance of the indenture of 1757, and in performance of the covenants therein contained, Lord *Bolingbroke* conveyed to the said Lord *Pembroke* and Lord *Guilford*, the premises in the deed of 1757 contained, upon the same trusts, and for the same uses, as were in the said deed mentioned, with a power to Lord *Bolingbroke*, during his life, and the trustees during the minority of the children of the marriage, to grant leases for three lives, or for thirty-one years, *(subject to certain restrictions, and solemnities particularly set forth;)* That, in the said release of the 4th of *November*, 1765, was contained a proviso of the tenor following, *viz.* "That if at any time "during the life of the said Lord *Bolingbroke* it should be "thought convenient by him, and the trustees, or the sur- "vivors, or survivor, and the heirs of such survivor, to sell, "dispose

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" dispose of, or exchange, all, or any part of the said settled
" estates, and lay out the money arising therefrom in the
" purchase of others to be settled to the same uses, it should
" be lawful for Lord *Bolingbroke*, notwithstanding the said
" uses and limitations, with the consent of the trustees, by any
" deed or deeds, with or without power of revocation, to be
" sealed and delivered by him, and the trustees, in the pre-
" sence of two or more witnesses, to *revoke, determine,*
" *annul, and make void, all and every the uses, estates,*
" *trusts, and limitations, powers, provisoes, authorities, and*
" *agreements, therein before limited, declared, created and*
" *contained*, of and concerning the premises so to be sold.
" disposed of, or exchanged, and by the same, or any other
" deed or writing, to be sealed, and with such consent as
" aforesaid, to limit the same premises, or any of them,
" whereof the uses should be so revoked, to the said trustees,
" upon trust, that they, with the consent and approbation of
" Lord *Bolingbroke*, signified by a deed under his hand and
" seal, should absolutely sell and convey the same to any
" purchaser, or purchasers, his or their heirs, executors, or
" administrators, or should limit any such new uses, or trusts
" of the same, as should be requisite for effecting such sale, [479]
" disposition, or exchange, and that, on payment of the
" purchase-money, it should be lawful for the trustees to
" sign receipts for the same, which should be sufficient dis-
" charges to the purchaser, or purchasers, and that when
" any of the said premises should be sold, for a valuable
" consideration in money, and such receipt should be given,
" and also when any of them should be sold, disposed of, or
" exchanged for, or in lieu of any other manors, &c. and the
" fee-simple of such last-mentioned manors should be vested
" in the said trustees, all and every the premises, so sold,
" disposed of, or conveyed in exchange, should be, and re-
" main for ever, thenceforth *freed, and absolutely dis-*
" *charged from all the uses, estates, trusts, declarations,*
" *powers, provisoes, and agreements, in and by the said*
" *indenture of release* limited and declared concerning the
" same, and then, and from thenceforth, these presents, and
" the grant and release hereinbefore contained, and hereby
" made, shall be and enure, as to so much of the same pre-
" mises as shall be so respectively sold, disposed of, or con-
" veyed in exchange, to the only use or behoof of such
" purchaser or purchasers, or of such other person or per-
" sons to whom the same shall be respectively sold, disposed
" of, or conveyed, and of his, her, or their heirs and assigns,
" *subject only to such leases, as before such sale or exchange*
" *shall have been made thereof, pursuant to the powers*
" *hereinbefore contained*;" That on the 24th of *July*, 1770,
by an indenture between Lord *Bolingbroke* and *Margaret*

 Hare,

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Hare, widow, (the lessor of the plaintiff,) reciting that his Lordship had executed a bond to the lessor of the plaintiff, conditioned for the payment of an annuity of £500 during his life, by quarterly payments, and that he had agreed to secure the said annuity upon certain estates, and that they should be conveyed to her for that purpose, it was witnessed that, in pursuance of such agreement, and in consideration of £3000 paid to him, for the purchase of the said annuity, he granted, bargained, sold, and demised, to the said *Margaret Hare, (inter alia,)* certain estates at *Beckenham*, in *Kent*, which estates were the premises mentioned in the declaration, and part of those contained in the deed of 1757, to have and to hold the same for 99 years, if he should so long live, subject to a pepper-corn rent, if demanded; That, by the same indenture, he covenanted, that he then stood lawfully seised of an estate for his life in the premises; That, by the said indenture, it was provided, declared, and agreed, that the said premises were so demised to the said *Margaret*

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Hare, upon an agreement, and to the intent, that she should lease back the same to him, and his assigns, for 98 years and 11 months, if he should so long live, under the rent of £500 *per annum*: That an indenture of re-demise, bearing date the 25th of *July*, 1770, in pursuance of the above agreement, for the said term of 98 years and 11 months, if Lord *Bolingbroke* should so long live, was made by *Margaret Hare* to him, subject to the rent of £500 *per annum*, payable quarterly, and that such last-mentioned indenture contained a proviso, that, if the said yearly rent of £500 should be behind, or unpaid, in part, or in all, *by the space of 28 days*, after any of the quarterly days of payment, *although no demand thereof should be lawfully made*, it should be lawful for the said *Margaret Hare* to re-enter; That memorials of the said indentures of the 24th and 25th of *July*, 1770, were duly inrolled in Chancery, before the commencement of the action, in pursuance of the statute of 17 *Geo.* 3. *c.* 26; That, by an act of the 8th of *Geo.* 3. the marriage between Lord *Bolingbroke* and Lady *Diana* was dissolved, and it was enacted that she should, during her life, receive £800 a year out of the premises contained in the deeds of 1757 and 1765, with power of distress and entry, to secure the payment thereof, and that the yearly sum for her separate use, and also the jointure settled on her, as aforesaid, should cease and be void; That, by indenture of the 20th of *October*, 1773, between Lord *Bolingbroke* and the trustees in the deed of the 4th of *November*, 1765, reciting that deed, and the power of revocation above set forth, and that it was thought convenient by Lord *Bolingbroke*, and the trustees, to sell the estates therein mentioned, (being the same with those granted and conveyed by the said deed of the 4th of *November*, 1765,) and

and to lay out the monies arising from the sale thereof, in other lands, to be settled to the same uses, and subject to the same powers, provisoes, &c. the said Lord *Bolingbroke*, by virtue and in pursuance of the power to him given by the said deed of the 4th of *November*, 1765, and in execution thereof, did, with the consent and approbation of the said trustees, limit and appoint all the said estates, to the use of the said trustees, upon trust, and to the intent that they, with the consent of Lord *Bolingbroke*, should sell and convey the same to any purchaser or purchasers, and should limit, create, &c. such new trusts, of and concerning the same, as should be necessary for executing and effecting such sale; That the defendant contracted with Lord *Bolingbroke* for the absolute purchase of the said estates, free from incumbrance, (except as in the said indenture of release, hereinafter mentioned, of the 22d of *October*, 1773, is excepted,) for the price of £19,068; That, for conveying the same to the defendant, the trustees and Lord *Bolingbroke*, on the 21st of *October*, 1779, for the consideration therein mentioned, bargained and sold the said estates, *(the same including the premises in the declaration mentioned,)* to the defendant, to have and to hold the same for a year, subject to a pepper-corn rent, if demanded, to the intent that a release of the same, in fee, might be granted to him; That, accordingly, by indenture of release of the 22d of *October*, 1773; reciting the release of 1765, the deed of 1757, the deed of the 20th of *October*, 1773, and the contract with the defendant; the said trustees, with the consent and approbation of Lord *Bolingbroke*, released to the defendant, all the said estates, &c. in the deed of the 20th of *October* specified, to the use of him and his heirs for ever; That the said last-mentioned indenture was duly executed, *according to the tenor of the power of revocation and sale, in the deed of the 4th of November*, 1765; That the premises in the declaration mentioned were *part of those so released to the defendant*; That the indenture of the 24th and 25th of *July*, 1770, were not, nor was either of them, nor any incumbrance created by them, or either of them, excepted, or mentioned by the indenture of release, of the 22d of *October*, 1773; That Lord *Bolingbroke*, by virtue *of the said indentures of the 3d and 4th of November*, 1765, *was tenant for life*, and in the actual possession and receipt of the rents and profits of the premises in the declaration mentioned, at the time of the execution of the deeds of the 24th and 25th of *July*, 1770; That the defendant, at the time of his contract for the aforesaid purchase, and of making the indentures of the 21st and 22d of *October*, 1773, *had due notice* of the indentures of the 24th and 25th of *July*, 1770, and of the yearly rent, or annuity, therein mentioned; That the defendant, and certain other persons, were, at

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at the time of bringing the ejectment, and at the time of the trial, in possession of the premises in the declaration specified; That a quarterly payment of the annuity had been, and still was, in arrear, *for* 28 *days*; And that on the 14th of *June*, *&c.* (subsequent to the expiration of the 18 days,) the lessor of the plaintiff demised to the plaintiff; That, by virtue of such demise, he entered, *&c.*

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This special verdict was argued, on *Tuesday*, the 21st of *November*, by *Morgan*, for the plaintiff, and *Rous*, for the defendant.

Morgan said, he supposed it would be contended, on the other side,—1. That the revocation of the uses of the release of 1765, by that of the 20th of *October*, 1773, had made void the demise to the lessor of the plaintiff. In answer to this, it ought to be considered, what the powers incident to a tenant for life are, and how far those powers were restrained, or narrowed, in this particular instance, by any thing contained in the release of 1765. The special verdict expressly finds, that Lord *Bolingbroke* was tenant for life. Now, that a tenant for life may grant any interest for years determinable with his own life, without incurring a forfeiture, is clearly settled by the authorities cited in 2 *Bacon's Abr.* 279. *viz.* 8 *Co.* 45. and *Co. Litt.* 233. Then, as to the effect of the leasing power, and of the power of revocation, in the release of 1765; the *first* can only regard such acts as Lord *Bolingbroke* was *thereby* authorized to do, which might affect the interest of those in remainder, after the determination of his estate for life. It cannot affect the powers incident to his estate for life. To have restrained him in that respect, would have been repugnant to the very nature of the interest granted to him. But the demise to Mrs. *Hare* was not an act which could affect the reversion; and it hath nothing whatever to do with the leasing power, nor was it at all necessary that it should be made under any of the restrictions required thereby. With respect to the power of revocation in the release of 1765, *that* could only extend to such estates as should exist in Lord *Bolingbroke*, and the trustees, at the time of executing the deed of revocation. It could not possibly enable the tenant for life to annul acts done by himself, and which, under that very deed which created the power of revocation, he had a power to do. Besides, it does not appear that Mrs. *Hare* was acquainted with the power of revocation, and, therefore, she is to be considered as a purchaser for valuable consideration, without notice. The defendant, on the contrary, bought the estate with full knowledge of this incumbrance, and, therefore, took it subject to the charge.—But, 2. It will be contended, that this is an action brought by the lessor of the plaintiff, as *landlord*, against the defendant, as *tenant*, and that the circumstances are not such as entitle her, under the

the statute of 4 *Geo.* 2. *c.* 28. § 2. to bring *an ejectment, *without re-entry or demand.* But it must be considered, that an entry by the plaintiff *is found by the verdict*, and indeed the defendant could not have obtained a special verdict, without confessing lease, entry, and ouster. As to *actual* entry, it has been solemnly determined in the Common Pleas, while WILLES, *Chief Justice*, presided in that court, that it is only necessary in the single case of avoiding a fine [1].

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Rous, for the defendant,—1. Denied that any such general rule had been laid down as had been just mentioned. He contended, that it was clear, from the wording of the statute of 4 *Geo.* 2. *c.* 28. § 2. that *demand*, and *actual* re-entry, in *all cases* between landlord and tenant, are only to be dispensed with, where there is *half* a year's rent in arrear, and no sufficient distress to be found on the premises. Here only a *quarter's* rent is stated to have been in arrear, and, as it is not found that there was not sufficient distress, the court, according to all the rules of construing special verdicts, must imply that there was.—2. It is clear that Mrs. *Hare* knew Lord *Bolingbroke* was only tenant for life, as she took her annuity for *his life*, not for her own. It must, therefore, be presumed, that she had recourse to the settlement creating his estate for life, and, if so, she must have known of the power of revocation, and therefore took the conveyance, knowing, if he should execute the power, that she would be reduced to the security of his bond. It is true, *Cator* was acquainted with the conveyance to Mrs. *Hare*, but, as he was advised that it did not bind the estate after the revocation, and he gave the full value, his conscience is not affected. If he had looked to the value of her incumbrance, which is stated to be £3000, and had deducted that from the full price, it would have been a fraud upon the trustees. At any rate, how far he shall be affected by the notice of Mrs. *Hare's* grant, is for the consideration of a court of *equity*. The *legal* estate must depend on the construction of the settlement of 1765. A tenant for life who has only a *qualified* or defeasible

[1] The case here alluded to, the name of which was not recollected, at the time, by any one at the bar, seems to be that of *Jenkin* v. *Prichard*, *C. B. M.* 30 *Geo.* 2. cited in *Law of N. Pr. ed.* 1775, p. 103 [F 1].

[F 1] The case of *Jenkin* v. *Prichard*, which is reported in 2 *Wilson*, 45, decides only, that to avoid a fine at common law without proclamations, no actual entry is necessary. I conclude the case alluded to, was *Tapner d. Peckham* v. *Merlott*; of which there is now a full and learned report, *Willes*, 177. It was there expressly ruled, and on great consideration, that actual entry was equally necessary to avoid a fine at common law.

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sible interest, cannot alien the estate, for his own life, discharged from the qualifications which affected it in his hands; and Lord *Bolingbroke*'s estate for life was *qualified*, and subject to the operations and consequences of the power of revocation. The interest of the trustees, and all the clauses and powers of the settlement, having been created in consequence of a marriage contract, were for valuable consideration. In the power of revocation, the *only* exception is with regard to leases made pursuant to the leasing power. Is it not, therefore, the obvious construction, that all other incumbrances, not made pursuant to that power, were to be affected by the revocation?

Morgan, in reply, observed, that this action was brought *on the express contract* between the parties, by which Mrs. *Hare* was entitled to enter, if any payment should be in arrear for 28 days, *not under the statute of Geo.* 2. As to the other point, he said that the demise by Lord *Bolingbroke* to Mrs. *Hare* ought to be considered as a relinquishment, *pro tanto*, of his power of revocation; and it would be a gross absurdity, if, after he had received £3000, on the security of his life estate, he could re-instate himself by an act of his own, and entirely relieve the estate from that incumbrance.

Lord MANSFIELD,—The defendant in this cause has turned the lessor of the plaintiff twice round, upon former occasions, by objections in point of form [1]. It would be very unfortunate, if he were to succeed a third time in a similar attempt.—As to the *second* point, was an *actual* entry necessary in this case? I have always taken the distinction to be, that, where entry is necessary *to complete the landlord's title*, (as when a power to re-enter is reserved to him in case of non-payment of rent,) there, the confession of lease, entry, and ouster, is sufficient; but that where it is requisite in order *to rebut the defendant's title*, actual entry must be made. This is the case when a fine is to be avoided. In the case of *Dormer* v. *Fortescue*, which was much argued, both

[1] The lessor of the plaintiff had first brought covenant against the defendant, as assignee of the estate, right, title, &c. granted by her to Lord *Bolingbroke*; the defendant pleaded, that the estate, right, title, &c. of Lord *Bolingbroke*, in the premises demised by her to Lord *Bolingbroke*, did not come to him by assignment: And on the trial it appeared that, besides the estate in *Kent*, Lord *Bolingbroke* had demised to her, and that she had re-demised, a farm in *Surry*, which farm was not sold to the defendant; and a case being reserved, and the question argued, (as stated *suprà*, p. 184. *Note* [21],) it was held, that he could not be sued as assignee. Afterwards, an ejectment was brought, but the lessor of the plaintiff having neglected to inroll the annuity, according to 17 *Geo.* 3. *c.* 26. she was nonsulted also in that action.

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both here, and in the House of Lords (*a*), I find the counsel could not state another instance, where *actual* entry must be made. The clause of the statute* of *Geo.* 2. is very confused, but I think it meant only to provide a remedy in cases of vacant possession, although other matters are thrown in. My present opinion is, that actual entry was not necessary in this case. *That*, surely, could never be the intention of the parties, where the right of re-entry is expressly reserved, if a quarter's rent shall be in arrear for 28 days.—With regard to the *first* point, I cannot frame a doubt upon it. Undoubtedly Lord *Bolingbroke* had a right to do what he did. It is a right which arises out of the nature of his estate. The question is, Whether *the same* Lord *Bolingbroke* who has made this demise, for a valuable consideration, can be authorized to revoke it under any power in any settlement? for, by the power, the revocation must be executed *by him*. There is a gross fraud attempted, in this case, either upon *Cator*, or on Mrs. *Hare*. If *Cator* did not know of the incumbrance, there was a fraud upon him. But it is found that he knew of it; and, therefore, the fraud was upon Mrs. *Hare*.—If the defendant's counsel can find any case of this sort, where actual entry has been held necessary, let them mention it to the court.

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WILLES, *Justice*, of the same opinion.

ASHHURST, *Justice*, of the same opinion. He recollected the case in *C. B.* alluded to by *Morgan*, and also a case of *Astlin* v. *Perkins*, in this court to the same effect.

BULLER, *Justice*,—I am entirely of the same opinion, as to the question on the effect of the revocation. With regard to the other, I think it proper it should be enquired into.

This day, Lord MANSFIELD, delivered the ultimate opinion of the court, as follows:

Lord MANSFIELD,—We have looked very particularly into the cases for two hundred years back, and we find a great deal of contrariety on the question, whether an actual entry is necessary, in order to maintain an ejectment, on a clause of re-entry, for non-payment of rent: but, in the most distant period, the better opinion has been, that it is not. This was Lord HALE's opinion, and is mentioned as such, and as that of Lord *Chief Justice* SCROGGS, by Lord HOLT, in the case of *Little* v. *Heaton* (*a*). But we look upon it as having been fully settled, in 1703, by the opinion of all the judges, upon deliberation, and consideration of all the

(*a*) Law of *N. Pr. ed.* 1775, p. 104. *Berrington* v. *Parkhurst*, *B. R. H.* 11 *Geo.* 2. 2 *Str.* 1086. & *Andr.* 125.

(*a*) 1 *An. N. Pr.* 2 Ld. *Raym.* 750. 1 *Salk.* 259. *S. C. Holt.* 264.

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the cases, that actual entry [F 2], is only necessary to avoid a fine [1];* and so the practice has been ever since. The reason of the thing is agreeable to the practice, for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service. In the case of fines it is required by a positive rule of law, and clearly necessary under the statute of 4 *Anne, c.* 16. *(b)*. I have a string

[1] *Qu.* If actual entry is not also necessary, in order to prevent the operation of the statute of limitations, 21 *Jac.* 1. *c.* 16. *Vide Law of N. Pr. ed.* 1775. p. 102 [F 3]. ☞ So held on a trial at bar in *Ford* v. *Grey, B.R.H.* 2 *Anne*, "unless there be some special reason to the contrary." 1 *Salk.* 285. Actual entry is also necessary, in order to enable a person who has recovered in ejectment, to maintain trespass for the mesne profits against one who was occupier when the title accrued, but not at the time of the ejectment. Law of *N. Pr. ed.* 1775, p. 87.

(*b*) § 16.

[F 2] In *Doe d. Duckett* v. *Watts*, 9 *East.* 17, the court held, that this necessity did not apply to fines at common law, but only to fines with proclamations under the statute of *H.* 7. But see the learned note of the reporter, in which it is observed, that the case of *Tapner* v. *Merlott, supra, cit. p.* 413, *in Not.* was not mentioned in that case.

[F 3] It is certainly laid down in *Bull. N. P.* expressly, that the trying of one ejectment, in which lease, entry, and ouster, are confessed, will not save the statute of limitations, for the purpose of another; but that the second ejectment must also be within twenty years, unless there has been an actual entry; and a reference is given to *Ca. K. B.* 473; but *Ford* v. *Grey*, is not referred to there for that point; and it seems, from both reports of that case, that no such point was there ruled. I apprehend that the passage here quoted from *Ford* v. *Grey* for that purpose, had a different import: viz: that, where a party relied upon an actual entry, to avoid the statute, such entry must be upon the land itself, without special cause, such as are mentioned in *Litt. s.* 421; see 6 *Mod.* 44. The reason, however, for the position in *Bull. N.P.* may be, that the entry as there confessed is confessed between different parties, and that the lessee in the second ejectment cannot be said to be the same person with the lessee in the former, both being fictitious. Yet the record in ejectment is held to be evidence against the same tenant in possession in an action against him at the suit of the lessor for mesne profits. *Query*, therefore, on what principle, in a second ejectment, where the lessor of the plaintiff is the same, and the defendant the same, proof of lease, entry, and ouster, confessed in the former, should not be evidence to save the statute of limitations in the latter; the confession of lease in the former necessarily implying an *entry by the lessor*, for the purpose of making the lease. It seems, however, if entry so confessed were equivalent to actual entry, it would be subject to the same restriction, and only be available upon action commenced within a year, according to 4 *Ann. c.* 16. *s.* 16.

string of all the cases on this subject, but it would be very unentertaining and unnecessary to state them. Mr. *Rous* also contended, that a *demand* of the rent was necessary. There seemed to be some weight in that point, upon the reason of the thing; and, on looking into the cases, it appears, to have a foundation in authority (*c*). But, *here*, by the express terms of the lease, the demand is dispensed with. The act of 4 *Geo.* 2. is very perplexed; but the meaning certainly only is, that, where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, you must make a demand [F 3].

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Judgment for the plaintiff.

(*c*) 2 Ld. *Raym.* 751, *in Marg.* ☞ *Vide*, also, *Cro. El.* 15. where it is said to have been held, that in the case of land, the demand must be on the most notorious place of the land, and, of a house, *in the house.*

The KING *against* READ.

Wednesday, 22d Nov.

A conviction by a justice of peace is bad, unless it set forth the evidence.

RULE to shew cause, why this and five other convictions upon the mutiny act (*d*), for not quartering officers, should not be quashed. The objection was, that the evidence was not set forth. The conviction run thus: " Whereupon, " witnesses being examined on oath, and the said *William* " *Read* having neglected, or refused, to attend, after " being duly summoned, to answer such complaints and in- " formations, and having duly considered on the evidences, " I, the said *Edward Dyne*, am of opinion, that the said " *William Read* did refuse to find such proper quarters " for the said *Thomas Davis*, as by the said act are directed " to be found; and I do, accordingly, adjudge and convict, " *&c.*

Peckham, in support of the conviction, insisted, that the fact was sufficiently stated to shew on what ground the magistrate founded his judgment.

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B. Hunter

(*d*) § 71.

[F 3] S. P. *Doe d. Forster* v. *Wandlass*. 7 *T. R.* 117 See also *Duppa* v. *Mayo*, 1 *Saund.* 287, and *note* 16, of Mr. Serjeant *Williams's* edition.

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B. Hunter was on the other side: but the court, without hearing him, said, the question was not open, and that the conviction could not be supported [1].

The conviction quashed.

[1] *Vide Rex* v. *Theed*, *M.* 5 *Geo.* 2. 2 *Str.* 919. *Rex* v. *Killet*, *E.* 7 *Geo.* 3. 4 *Burr.* 2063. ☞ *Rex* v. *Bryan*, *H.* 11 *Geo.* 2. *Andr.* 81 [F 1].

Wednesday, 22d Nov.

DOE, Lessee of FONNEREAU, *against* FONNEREAU.

An estate to *A.* for life in a *deed*, and a limitation of the same estate to the heirs of the body of *A*, in a *will*, (though the estate by the deed was voluntary, and moved from the testator, and is recited in the will,) do not unite so as to give *A.* an estate-tail, but the heirs of his body take by *purchase.*—A devise of a real estate to *B.* after a good executory devise thereof to the heirs male of the body of *A.* from and after the decease of *A.* and limited on default of such issue, is a good executory devise; vesting, either *in possession*, on the death of *A.* without leaving issue-male, or *as a remainder after an estate-tail*, on his death leaving issue-male.

UPON a special verdict, in an action of ejectment, which was tried before Lord MANSFIELD, at the Sittings for *Middlesex*, after *Easter Term*, 19 *Geo.* 3. the facts were: That *Claude Fonnereau*, being seised in fee, by indenture, bearing date the 1st of *April*, 1735, and made between him and his eldest son *Thomas Fonnereau*, in consideration of natural love and affection, did give and grant to the said *Thomas Fonnereau*, and his assigns, the estate in question, to hold the same to him, and his assigns, from *Michaelmas* then last past, *for life*, without impeachment of waste, at the rent of a pepper-corn, if demanded: that *Thomas*, the son, entered, and was seised in his demesne as of freehold, for life, the reversion in fee remaining in the father; and that the father, on the 27th of *June*, 1738, devised the said reversion in the words following;—" Whereas I have settled my estate, called " *Christ-Church*, at *Ipswich*, in *Suffolk*, (the lands in question,) upon my eldest son *Thomas Fonnereau*, for the term " of his natural life; my will is, and I do hereby, *from and* " *after his decease*, give and devise the same *to the heirs male* " *of his body* begotten in lawful marriage, and, *in default* " *of such issue*, to the use and behoof *of my second, third,* " *fourth, and fifth sons*, severally, successively, and in remainder, one after another, as they every of them are *in* " *priority of birth, and seniority of age*, and *of the several* " *heirs male begotten* in lawful marriage, of the body and " bodies of my said sons respectively issuing, *the elder of* " *my said sons*, and the heirs male of his body, to be always " preferred, and to take, before the younger of my said sons, " and

[F 1] See also *R.* v. *Thompson*, 2 *T. R.* 18, as to the mode of setting out evidence in a conviction for using a gun to destroy game: a precedent which the court thought so established, that they would not allow it to be called in question, (although inconsistent with the cases of other convictions,) and refused a rule *nisi* for that purpose, on the motion of *Abbott*, *E.* 47 *G.* 3. *R.* v. *Pearce.*

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Doe against Fonnereau

" and the heirs male of their bodies; and, for want of such " issue, to my right heirs:" that the testator, afterwards, on the 5th of *April*, 1740, died, seised of the said reversion, leaving the said *Thomas Fonnereau* his eldest son, *Claudius Fonnereau*, (the lessor of the plaintiff,) his second son, and three other sons; that, after the death of the testator, his eldest son *Thomas*, being seised of the premises as the law requires, covenanted to levy a fine, for the purpose of making a tenant to the *præcipe*, which he afterwards did, and suffered a recovery, to the use of himself in fee: that afterwards, on the 6th of *January*, 1779, *Thomas* devised to the use of his nephew *Martin Fonnereau*, (the defendant,) for life, with divers remainders over: that *Thomas*, soon after making his will, died seised, without leaving, or ever having had, any lawful issue whatsoever, and without having ever been married: that the lessor of the plaintiff, in 1779, made an actual entry into the premises, for the purpose of avoiding the fine levied by his brother *Thomas*.

The case was argued, in *Trinity Term*, 19 *Geo.* 3. (*a*), by *Rooke*, for the plaintiff, and *Wilson*, for the defendant; and again, in *Hilary Term*, 20 *Geo.* 3. (*b*), by *Hill*, Serjeant, for the plaintiff, and *Dunning* for the defendant; and, in *Easter Term* following (*c*), Lord Mansfield delivered the opinion of the court, in favour of the defendant. A few days afterwards, however (*d*), his Lordship directed, that the judgment should be stopped, and the case argued again in the ensuing term. Accordingly, there was a third argument in *Trinity Term*, 20 *Geo.* 3. (*e*), by the *Solicitor-General*, for the plaintiff, and *Grose*, Serjeant, for the defendant; after which, the case stood over till this day, when judgment was given for the plaintiff.

There were two general questions in the case; 1. Supposing the limitations over to the *second*, and other sons, to have been good in their creation, whether they were not barred and destroyed by the recovery: 2. Whether those limitations were not void from the beginning?

If *Thomas*, the son, took an estate-tail, it was clear that the limitations over were barred, and the title of the lessor of the plaintiff destroyed. But such an estate-tail could only have vested in *Thomas*: either, 1. by *coupling* the estate for life, settled upon him by the *deed* set forth in the special verdict, with the limitations to his heirs-male in the *will*, so as to bring this within the rule in *Shelley's* case (*f*), or, 2. by construing

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(*a*) *Friday*, 18 *June*, 1779.

(*b*) *Tuesday*, 8 *February*, 1780.

(*c*) *Friday*, 14 *April*, 1780.

(*d*) *Tuesday*, 18 *April*, 1780.

(*e*) *Tuesday*, 30 *May*, 1780.

(*f*) *C. B. T.* 23 *El.* 1 *Co.* 93. *b.* 104. *a.* 106. *b.*

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construing him to have taken such estate-tail under the will. If *Thomas* took only an estate for life, then the recovery could not bar the limitations to the second and other sons, if they were good in their creation; and, therefore, on this supposition, it was necessary for the defendant to insist, that those limitations were executory devises, and void, as being limited on too remote a contingency. In consequence of these different views of the case, there were *four* different heads of argument insisted upon by the counsel for the plaintiff.

1. They contended, that the limitations to *Thomas* in the deed, and to his issue-male in the will, could not be coupled, so as to make the words of the latter words of *descent*, and to vest an estate-tail in him.

2. That an estate-tail to *Thomas* could not be raised from the words of the will.

3. That the limitation to the second son, was an *immediate* devise of the reversion after *Thomas*'s life, by which an estate-tail in that reversion vested in the second son *Claudius*, (the lessor of the plaintiff,) immediately on the testator's death, with successive vested remainders over to the other younger sons.

4. Or, if it should be held that the successive devises to the younger sons were all future and executory [F 1], then, that they were not within the reason and principle upon which executory devises had been held void as being too remote.

On these *four* heads the substance of the arguments for the plaintiff was as follows.

1. The rule in *Shelley*'s case, only applies where the first and subsequent limitations are in the same instrument. The words are: "When the ancestor, by any gift or conveyance, "takes an estate of freehold, and, *in the same gift or con-* "*veyance*, an estate is limited, either mediately or im- "mediately, to his heirs in fee, or in tail, that always, in "such cases, '*the heirs*' are words of limitation of the "estate, and not words of purchase (*a*)." The court *now*, [490] (when the feudal reasons for which it was introduced have ceased,) will not be inclined to extend the rule; as it tends, in most instances, rather to defeat than give effect to the real intention

(*a*) 1 *Co.* 104. *a.*

[F 1] That the limitations to the heirs of *Thomas*, as well as those to the other sons, (not being created by the same instrument which created the estate for life to *Thomas*) were executory devises, and not remainders: see *Fearn Co.t. Rem.* 448.

intention of the testator[F 2]; and, though some authorities may be mentioned where it has been, perhaps, carried further in some respects than the words above cited import, yet, on a review of all the cases on the subject, so far from there being any decision to warrant the application of it to the case of limitations in two different conveyances, it will be found that the contrary has been determined. In the first *Institute (b)*, Lord *Coke* expresses himself thus: "If a man "seised in fee, make a feoffment in fee, (and depart with his "whole estate,) and limit the use to his daughter, for life, "and, after her decease, to the use of his son, in tail, and "after, to the use of the right heirs of the feoffor; in this "case, albeit, he departed with the whole fee-simple by the "feoffment, and limited no use to himself, yet hath he a reversion, for whensoever the ancestor takes an estate for "life, and after, a limitation is made to his right heirs, the "right heirs shall not be purchasers; and here in this case, "when the limitation is to his right heirs, and right heirs he "cannot have during his life, (for *non est hæres viventis*) the "law doth create a use in him during his life, until the future "use cometh *in esse*, and, consequently, the right heirs cannot be purchasers; and no diversity where the *law* creates "the estate for life, and when the party." This extends the rule in *Shelley's* case, to that of a *resulting use* for life, but still that resulting use arises upon the *same* conveyance which creates the limitation to the heirs. In *Pibus* v. *Mitford (a)*, a father covenanted to stand seised "*to the use of his heirs "male, begotten or to be begotten on the body of his second "wife*:" and there, too, it was held by Lord HALE, WILD, and

(b) Co. Litt. 22. b. (a) B. R. T. 36 Car. 2. 1 Ventr. 372.

[F 2] The rule has been applied to cases, where it obviously counteracts the intent of the testator, when the intent defeated is only a *particular* intent, and the application of the rule is necessary to give effect to the *general* intent. As where the estate is given to the first taker "for life only," but it appears to be the intent of the testator, that all the issue of the first taker should inherit the whole estate, before it should go over; and there remains no other mode of rendering that general intent available, but by giving an estate of inheritance to the first taker. See *Doe* v. *Cooper*, 1 *East*. 229. and *Woods* v. *Baron*, *ib*. 259. and the cases there cited. But if it appear clearly, from the expressions of the will, that the testator designed the heirs to take as purchasers; as, if they are mentioned severally and successively, &c. in such case this rule of construction gives way, and the first taker has only a life estate, with remainder to the persons designated by the description of heirs; even though the technical phrase heirs of the body be used. *Goodtitle* v. *Herring*, 1 *East*. 264, and the cases there cited.

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and Rainsford, *Justices*, against Twisden, *Justice*, that an use for life in the father arose by implication, which united with the express limitation to the heirs male by the second wife, so as to make him tenant in special tail; but still, this implication arose upon the same conveyance which created the express limitation. In *Goodman* v. *Goodright (b)*, it is manifest, from the reasoning, both of the counsel and the court, (although there was no express opinion given,) that it was not thought the estate given to the niece, *by the articles*, could unite with the limitation to the heirs of her body by another husband, *in the will*. These authorities, therefore, [491] (which may perhaps be cited on the other side,) do not carry the rule to the case of two different conveyances; nor can any positive decision be found that does. The only instance of a doubt having been entertained, was by Lord Keeper *Wright*, in the case of *Clifton* v. *Jackson (c)*, who is stated to have said, that "all the authorities are only in the affirmative; "that, if by the same deed, they shall consolidate; not nega-"tively; that, if by different deeds, they shall not." But there was no determination in that case; and he was clearly mistaken as to the authorities. In *Cranmer's Case (d)*, Dyer, *Chief Justice*, expressly says, that, "if a lease is made to "*A*. for life, the remainder to the right heirs of *B*. and *B*. "purchaseth the estate of *A*. the estate in remainder is not "executed, *for it is not conveyed by the grant of the first* "*grantor, but by the act of another person after the grant.*" So, in *Snow* v. *Cutler (e)*, a husband and wife being seised of a copyhold estate, to them and the heirs of the husband, the husband surrendered to the use of his will, and afterwards devised to the heirs of the body of the wife, if they should attain 14 years, and, though the court differed on some of the points in the case, and did not give judgment, yet they all agreed that the devise to the heirs of the body of the wife, was not a remainder to her, but an executory devise, "for "although the wife had an estate for her life, yet this is a new "devise, to take place after her death, and is not a remainder "joined to her estate." And, again, in *Moore* v. *Parker (a)* *A*. having issue *B*. his son, settled lands, on the marriage of *B*. to the use of *B*. for life, remainder to the wife of *B*. for life, remainder to the first and other sons in tail, with reversion to himself in fee. Afterwards, *A*. devised the same lands, to such *issue-male* as *B*. should have by any other wife, in tail-male, and, in case of failure of issue-male *in B*, to his grand-children by his daughter C. in fee. *B*. suffered a recovery, and

(b) M. 33 *Geo*. 2. 2 *Burr*. 873. *Vide infra*.

(c) *Canc*. *H*. 1704. 2 *Vern*. 486.

(d) C. B. 16 *Eliz*. 2 *Leon*. 5. 7.

(e) B. R. T. 16 *Car*. 2. 1 *Lev*. 135, 136.

(a) B. R. E. 7 *Will*. 3. 1 *Ld*. *Raym*. 37. 4 *Mod*. 316. *Skinn*. 558.

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and died without issue-male. HOLT, *Chief Justice*, doubted as to the reversion devised to the grand-children, because there was a prior devise, to persons not *in esse, per verba de præsenti;* but he was clear that the devise to *B.*'s issue-male, by any other wife, could not be tacked to the estate for life, *because that was limited by another conveyance*; and, in this, all the other judges concurred [1]. Lastly, in *Hopkins* v. *Hopkins (b)*, Lord HARDWICKE, in citing *Pibus* v. *Mitford*, seems clearly to have thought that the rule ought not to be carried farther than it had been in that case *(c)*.

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2. It will be impossible for the defendant's counsel to maintain, that *Thomas* took an estate-tail by the will. In the *first* place, he certainly did not take such estate by *express* devise. If the testator had, in words, devised to him the life-estate, which he *had* already by the deed, that devise could have had no effect; but there is no attempt of that sort in the will, which only takes notice of the life-estate which *Thomas* already had, by way of recital; and, that a mere recital will not amount to a devise, has been often determined [F 3], particularly in *Wright* v. *Wyvell (d)*, and *Right* v. *Hammond* (*e*). In the *second* place, it will not be possible to raise an estate-tail to *Thomas* by *implication.* On this point, the case of *Lanesborough* v. *Fox (f)*, was not stronger than this. There, Lord *Lanesborough*, having the reversion in fee, of lands settled upon the marriage of his son *James Lane* in strict settlement, devised all the lands in that settlement, (to which the will referred,) "*on failure of issue of* "*the body of James Lane, and for want of the heirs-male* "*of my body,*" to his daughter *Frances*, in tail, with remainders over; and it was adjudged, in the House of Lords, upon the opinion of all the judges, that *James* did not take any estate-tail by implication [☞]. Such an implication is never made unless in order to effectuate the intention of the testator. It will be contended, perhaps, that *Claude Fonnereau* must have intended to give to his son *Thomas*, as large an estate

[1] *Holt* cited, for this, a case in 29 *Ed.* 3. exactly similar to that put by *Dyer* in *Cranmer's Case* above-mentioned.

(*b*) *Canc.* 1738. 1 *Atk.* 581.

(*c*) *Ibid.* 596.

(*d*) C. B. *T.* 1 *W.* & *M.* 2 *Ventr.* 56, 7.

(*e*) *B. R. E.* 7 *Geo.* 1. 1 *Str.* 427. 429. *S. C. Com.* 232.

(*f*) *Dom. Proc.* On Error from *Cam. Scacc.* in *Ireland*, *E.* 6 *Geo.* 2. *Ca. Temp. Talb.* 262.

[☞] S. P. *Letheullier* v. *Tracey*, *Canc.* 1754. 3 *Atk.* 793. 796, 797. *Ambl.* 220. 224.

[F 3] See acc. *Skerratt* v. *Oakley*, 7 *T. R.* 492.

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estate as to his other sons, and that, as the limitations to the second, and other sons, are estates-tail, the will ought to be so construed as to give the same estate to the eldest. But the truth is, that, though, in words, he has given estates-tail to his younger sons, he certainly did not mean that the second should be able to defeat the limitations over to those in succession after him, &c. nor, of course, that *Thomas* should be able to destroy that to the second.

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2. If the eldest son had not such an estate as enabled him to suffer a valid recovery, nothing done by him has divested any right which the second son had under the will, and, therefore, it remains to see whether the devise over to the second, and other sons, is capable of such a construction, as to be good and effectual without contradicting any rule of law. The affirmative of this may be maintained in two ways. In the *first* place, the will may be so construed as to give the second son an *immediate* estate, in the reversion expectant on the death of *Thomas*, subject to open and let in the devise to the heirs-male of *Thomas*, if, and when, any person should happen to answer that description. This construction may be supported on the authority of *Uvedall* v. *Uvedall* (a), where, there being a feoffment to the use of *A.* for life, remainder to the use of his first and other sons, in tail-male, remainder to the use of *B.* for life, remainder to his first and other sons in tail-male, and *A.* having no son, and *B.* having one, *A.* cut down timber trees, and it was held that *B.*'s son, might maintain *trover* for the trees, as having the *immediate* inheritance at the time that they were cut down, and the remainder to the first and other sons of *A.* was no impediment, being but a possibility, which might never happen. According to a notion which long prevailed, an estate given *per verba de præsenti*, to persons not *in esse* at the time of the testator's death, (as here to the heirs of the body of *Thomas*,) was void; but even then, it was held that the limitation over was not also void, but vested immediately, in the same manner as if there had been no such preceding devise; 2 *Rolle's Abridgment*, *title Remainder* (b), *Scolastica's Case* (m), *Avelyn* v. *Ward* (c), *Andrews* v. *Fulham* (d), *Goodright* v. *Cornish* (e), *Scattergood* v. *Edge* (f). This distinction,* indeed, has been over-ruled in later cases, and it has been held that,

(a) *B. R. M.* 24 *Car.* 1. 2 *Roll.* 119. *A.* pl 3 *Alleyn* 81.

(b) P 425. (C) 7. *Cites* 9 *H.* 6. 24. 6.

(m) C. B. M. 13 & 14 *El. Plowd.* 403. 414.

(c) *Canc.* 1749. 1 *Vez.* 420.

(d) *B. R. T.* 11 & 12 *Geo.* 2. *Andr.* 263. 269.

(e) *B. R. H.* 5 *W.* & *M.* 1 *Salk.* 226. 1 Ld. *Raym.* 3.

(f) *C. B. T.* 9 *Will.* 3. 1 *Salk.* 229. *S. C.* 12 *Mod.* 278; and, now, in Supplement to *Ed.* of 1781, of 11 *Mod.* 277.

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that, in whatever words the devise is, yet, if it be clear, from the subject-matter, that the testator meant it to be future, it shall enure in that manner,* and not be void, though the devisee is not *in esse* at the time of the testator's death; *Harris* v. *Barnes*(g), *Doe* v. *Carleton*(h) [1].

4. [2]. The devise to the second son, (if not immediate,) *[494] may be considered either—*First*, as an executory limitation upon the alternative of one of two events, (which alternative is quaintly termed *a contingency with a double aspect,*) *viz.* either the event of *Thomas* leaving issue-male of his body, or, that of his dying without leaving issue-male, (which is what, in truth, has happened;) and on this last event happening, it would actually vest in possession, long within the time allowed by law, namely, immediately on the death of a person *in esse*:—or, *secondly*, independent of that ground, as such an executory devise as, in all events, and which ever of the two contingencies should happen, could not tie up the estate from alienation beyond 21 years after the death of a person *in esse*, and therefore, not within the principle of the rule, making devises on the indefinite failure of issue void as being too remote.—*First*, As to the implied double contingency, cases of that sort have been often determined on personal property, and the devise over supported, when the second of the two events took place (i); and there is no sound reason why a like implication should not be made in devises of land so as to support the intention of the testator. Indeed, it ha been so held by this court in a late case, *viz. Baldwin* v *Karver* (k), which was sent from the court of *Chancery*, and in which both real and personal property were held to pass to the devisees, after an executory devise to the heirs of the body of *A.* such heirs never having come *in esse*.—But, *secondly*, as to the other ground, and supposing no such double contingency to be implied as having been in the contemplation of the testator, what is to hinder this to be supported as a good executory devise? The only objection to the validity of such a devise is, the possibility of its not vesting within

(g) *B. R. H.* 8 *Geo.* 3. 4 *Burr.* 2157. Since reported, 1 *Blackst.* 643.

(h) *C. B. T.* 21 & 22 *Geo.* 2. 1 *Wils.* 225.

[1] *Rooke* cited *Pay's Case*, reported *Cro. Eliz.* 878, and mentioned in *Hopkins* v. *Hopkins*, *Ca. Temp. Talb.* 48, to shew, that the nature of a devise may vary, so as to be construed a remainder, or executory devise, as will best support the intention, according to circumstances. But Lord MANSFIELD told him, *that* proposition had been exploded, and that it is settled, that a will must always be construed as it ought to have been at the instant of the testator's death.

[2] Lord MANSFIELD said to *Rooke*, on the first argument, that the whole point seemed to him to be, whether they could make the estate to the second son good, on the ground of an implied double contingency.

(i) *Stanley* v. *Leigh*, *Canc. M.* 1732, 2 *P. Will.* 686, &c.

(k) *Vide infra*, p. 503. *Note* [1].

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within the time required by law to prevent perpetuities. If that objection does not lie, it will be maintained, though against the other rules of law. Thus, by way of executory devise, a fee may be limited on a fee (*a*); a contingent estate may be created, without a previous freehold interest to support it; a term may be given to one for life, with limitations over, *&c.* But it will be said to be part of the rule, as to the time when an executory devise can vest, that, if it is limited after an indefinite failure of issue, *that* is too remote, and that, here, the limitation to the second son, (if the implied double contingency shall be rejected,) is after an indefinite failure of the issue-male of *Thomas*. But, when the principle on which this rule is founded is examined, it will be found not to apply to the present case. Every estate created by way of *remainder*, may be destroyed, and the estate aliened, twenty-one years, (or a few months more (*b*),) after the death of the person *in esse*, at the time of its creation; for if the remainder is to the unborn son of *A*. in tail, (and none more remote can be limited,) and the particular estate is limited for life, either 1. to *A*. or 2. to *B*. the remainder *must* vest in interest, as soon as a son is born to *A*.; and, if we suppose that son to be posthumous, still he will come of age twenty-one years and a few months after the death of his father, and then by himself, (if his father was the particular tenant, or if *B*. was, and is dead,) or by joining with *B*. (if *B*. was the particular tenant, and is then alive,) he may suffer a recovery, destroy all subsequent limitations, and alien the estate. As an *executory devise* cannot be barred by a recovery, or any other act of the person previously entitled to the estate (*c*), after their general validity came to be allowed, the courts were anxious to restrain them, so as not to create perpetuities, or tie property up longer than it can be done by way of remainder; and, therefore, if they are limited so as not possibly to take effect till more than twenty-one years and a few months after the death of a person *in esse*, they are held to be void. Thus an executory devise, to take effect after an unborn son of *A*. should attain his age of twenty-five, would be void, as being too remote, and, *a fortiori*, if it were not to take effect till an indefinite failure of the issue of *A*. they not having any previous estate in the land. If the first limitation is an executory devise, then all that follow are. Therefore, on the supposition, that, here, the devise to the heirs of the body of *Thomas* was future and executory, those to the second, and other sons, also were. But it is settled, that, whenever the first limitation, in such case, vests *in possession*, those

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(*a*) *Pells* v. *Brown*, *B. R. M.* 18 *Jac.* 1. *Cro. Jac.* 590.

(*b*) In the case of a posthumous child, by 10 *&* 11 *Will.* 3. *c.* 16.

(*c*) *B. R. M.* 18 *Jac.* 1. *Pells* v. *Brown*, *Cro. Jac.* 590.

those that follow, vest *in interest* at the same time, and therefore cease to be executory, and become mere vested remainders, and subject to all the incidents of that sort of estate (*a*). If, therefore, the estate to the heirs-male of *Thomas* had vested, by his leaving male-issue, which it must have done, if at all, at his death, or in a few months after it, then the limitations over would have become vested remainders. On this supposition, as soon as the son of *Thomas* came of age, he might have suffered a recovery to bar the subsequent estates to the second and other sons. The only other possible event is that which has happened, *viz.* the death of *Thomas* without leaving male issue. In that case, the estate in the second son, vests in possession immediately, and, therefore, either way, the land could not be fettered beyond twenty-one years and a few months after the life of a person *in esse.* This being the case, the limitation to the second son, cannot be considered, on any supposition, as too remote.—*Doe* v. *Carlton* (*b*), *Harris* v. *Barnes* (*c*), *Goodright* v. *Cornish* (*d*), *Gore* v. *Gore* (*e*), *Hopkins* v. *Hopkins* (*f*), and *Brownsword* v. *Edwards* (*g*) were cited, as establishing the principles and reasoning on this head; but, particularly, the case of *Stephens* v. *Stephens* (*h*) was, on the second and third argument, insisted on, as directly in point.

The counsel for the defendant argued, on the different heads, to the following effect:

1. The primary intention of the testator manifestly must have been to give *Thomas* an estate-tail; for there can be no reason to suppose, that he meant to limit a different, or better, interest, to his younger sons, than to him; *King* v. *Melling* (*i*). The court, therefore, will do every thing in their power, consistent with the rules of law, to give effect to that intention. Now, it has never yet been determined, that two [497] estates in the same land, though by different conveyances, given *to* the same person, both voluntary, and both flowing *from* the same person, shall not unite. Though not within the exact words, such a case is clearly within the principle of the rule in *Shelley's* case. *Here*, the deed was voluntary; it might have been defeated by the father; and he considered himself as confirming it, and giving the same estate again by his will. To consider the deed, and the will, as the same conveyance,

(*a*) *Stephens* v. *Stephens*, *Hopkins* v. *Hopkins*, &c.

(*b*) C. B. T. 21 & 22 *Geo.* 2. 1748. 1 *Wils.* 225. and cited 4 *Burr.* 2160.

(*c*) *B. R. H.* 8 *Geo.* 3. 4 *Burr.* 2157.

(*d*) 1 *Salk.* 226.

(*e*) *Canc. T.* 1722. 2 *P. Will.* 28.

(*f*) *Canc. M.* 1734. *Ca. Temp. Talb.* 44.

(*g*) *Canc.* 1751. 2 *Vez.* 243. 249.

(*h*) *Canc.* 1736. *Ca.Temp.Talb.* 228.

(*i*) *B. R. M.* 24 *Car.* 2. 1 *Ventr.* 225. 2 *Lev.* 58.

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conveyance, would only be analogous to what the law does in other instances; as of powers, and the execution of those powers, fines or recoveries, and deeds to declare or lead the uses, &c. None of the cases cited to shew, that the two limitations cannot unite, amount to any thing like an authority or decision applicable here. The case mentioned by *Dyer*, in *Cranmer*'s case, differed materially from this; for, there, the limitation for life came to *B.* after the creation of *that* to his right heirs, and they came from *different* persons. *Snow* v. *Cutler* was never decided; and there, too, the two estates came from *different* persons[1]. In *Moore* v. *Parker*, there was no determination; but, there, the limitation to the first and other sons of *B.* shewed that it could not be intended that he should take an estate-tail; and if both, in that case, had been limited by the same conveyance, they could not have been consolidated. The point is clearly considered by the court, in *Goodman* v. *Goodright* (*a*), as then undetermined; and it certainly has not been decided since that case.

2. To raise an estate-tail in *Thomas*, upon the words of the will itself, will be most consonant to the intention of the testator, for he certainly must have meant that all the sons of *Thomas* should be *capable* of taking; yet, if *Thomas* had left several sons, according to the construction contended for on the part of the plaintiff, an estate-tail would have vested in the eldest, on the father's death, and then the others would have been totally excluded, though the issue of the eldest should afterwards have failed. Those words, therefore, consistently with the intention of the testator, cannot be construed to limit an estate-tail, by purchase, to the sons of *Thomas;* and, if it appear to the court, that he must have meant to give such estate to *Thomas* himself, they will give effect to that intention, if they can, either upon the express words, or by legal implication. [498] Now there seem to be *express words* sufficient for that purpose. Consider the whole devise together as one sentence. After mentioning *Thomas*, the eldest son, and then the second, third, fourth, and fifth, the testator adds, *The elder of my said sons, and the heirs male of his body, to be always preferred, and to take before the younger of my said sons and the heirs male of their bodies*, Does it not seem clear, that *Thomas* was here meant by "*the elder of my said sons*," and that an immediate estate-tail in the reversion was thereby expressly limited to him? But, if there were no *express words*, still, if there is a fair ground for *implying* an estate-tail, the court will do it, to promote, though never to defeat, the intention of a testator.

[1] It does not appear, from the report of the case, whether they did, or did not. (*a*) 2 *Burr.* 878.

testator. Instances of such implied devises are very ancient. There is one of an estate for life, in the *year-book* of *Henry* VII. where the devise was, "*all my goods to my wife, and* "*after my wife's death, my son and heir shall have the* "*house*; and, (says the book,) although there was no de-"vise of the house made to the wife, by express words, (but "only by implication, because the heir was not to have it "during the life of his mother,) yet, forasmuch as it was the "intent of the testator, that the son should not have it during "her life, therefore the wife should have it for life;" to which all the justices agreed *(a)*. And, in *Cozen's* case *(b)*, where the words were, "*And if it shall please God to take* "*my son Richard before he shall have issue of his body,*" it was held that *Richard* took an estate-tail by implication. It is impossible to believe, that the testator meant to give a different interest to *Thomas* from that limited to his younger sons; and there is no weight in the argument, that, by giving him an estate-tail, he enabled him, (by the power of suffering a recovery incident to it,) to defeat the limitations over; for that cannot be supposed to have been in the testator's contemplation, and the argument would be just as strong against the estate-tail in the first of the younger sons, he being thereby enabled to frustrate the intention as to those after him, and so on, successively, through all the rest.

3. This cannot be taken as a present devise of the reversion to the second son, subject to be divested if *Thomas* should have a son; 1. Because the second son would take by *purchase*, and, when that is the case, a vested estate is never divested again, by any subsequent event [1]; And, 2. Because the words of this will are all *future*, and nothing was meant to vest till after the death of *Thomas*.

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4. The idea of a double contingency is contrary to the intention of the testator: for it supposes him to have *meant*, that if *Thomas* had no sons, his own second son should take the estate, but that he should not if *Thomas* had a son; whereas the testator certainly *meant*, (though his intention, as he has expressed it, was contrary to law,) that his second son should take, at all events. There is no case of a double contingency being implied, as to real property, unless where the whole fee-simple is disposed of by the first contingent limitation,

(a) H. 13 *Hen.* VII. p. 17. *pl.* 22. *Vide Brooke, tit. Devise, pl.* 48. 52. *Plowd.* 521.

(b) C. B. 29 *Eliz. Owen* 29.

[1] *Qu.*—When an estate *descends*, it is often afterwards divested. Thus, when there is an executory devise, the inheritance descends to the heir, subject to be divested when the devise can take effect. So it is also now settled, since *Carter* v. *Barnardiston*, *(Canc. M.* 1708. 1 *P. Will.* 505.) that it descends in like manner in the case of contingent remainders; at least if created by will.

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limitation, so as if the first taker comes *in esse*, the whole vests in him [2]. *Baldwin* v. *Karver* will be found not to have turned upon a double contingency. In the present case there was but one contingency. Wills must be construed upon the circumstances as they stood at the testator's death, and cannot vary from subsequent events. What then was the limitation to the testator's second son at the time of his death? Why, a future executory devise on the general failure of issue-male of *Thomas*. *That*, which might not have happened for ages, is the only contingency the testator had in view; and although, in fact, *Thomas* happened to die without leaving issue-male, that circumstance, which was posterior to the death of the testator, (according to the undeniable principle just stated,) cannot alter the construction. If the contingency, on which the estate to the second son was limited, had been *the failure of issue of Thomas, at the time of his death*, then the limitation would have been good. But, 1. There are no words, here, to restrain it to that period. 2. In the case of terms, such devises have been construed to be confined in that manner, when any words were used which could possibly admit of that construction; as in *Target* v. *Gaunt* (a), *Pinbury* v. *Elkin* (b), *Forth* v. *Chapman* (c), and *Harris* v. *Barnes* (d); but, in all those cases, the court have made a [500] distinction between real estates and terms, and have held that, in cases of real estates, the same words would not restrain the time to the *death of the party*. This limitation therefore is void, as being too remote, and exactly within the determination in the cases of *Lanesborough* v. *Fox*, and *Goodman* v. *Goodright*. In the former, an estate being limited by deed, (after several previous limitations,) to the heirs male of the body of the testator's son *James*, and with reversion to the testator, he devised, "on failure of issue of the body of "*James*, *and for want of the heirs male of his own body*," to his daughter *Frances*, in tail, with remainders over; and it was determined, on a writ of error from the Exchequer Chamber in *Ireland*, in the House of Lords, by the opinion of all the judges, that the future devise, after the indefinite failure of the issue-male of the testator, was void, as being limited on too remote a contingency (e). In *Goodman* v. *Goodright*, the estate had been agreed to be limited by the marriage articles, to *E. W.* the testatrix's nephew-in-law, for life, remainder to *A. L.* her niece, (his wife,) for life, remainder to their first and other sons, successively, in tail, remainder

[2] As in *Luddington* v. *Kime*, 1 Lord *Raym*. 203. *Gulliver* v. *Wicket*. 1 *Wils*. 105. *Goodtitle* v. *Dunham*, *supra* 2.

(a) *Canc*. *E*. 1718. 1 *P*. *Will*. 432.

(b) *Canc*. *T*. 1719. 1 *P*. *Will*. 563.

(c) *Canc*. *M*. 1720. 1 *P*. *Will*. 663.

(d) *B*. *R*. *H*. 8 *Geo*. 3. 4 *Burr*. 2157.

(e) *Ca*. *Temp*. *Talb*. 268.

remainder to their first and other daughters, successively, in tail, with reversion to the testatrix, in fee. Afterwards, the testatrix, by her will —reciting that the estate was limited, or agreed to be limited, after her own death, and the death of her nephew-in-law, and niece, and, *in default of issue of their two bodies,* to herself in fee,—devised the inheritance to the heirs of the body of the niece *A. L.* by any other husband, and, for want of such issue, to her nephew *C. L.* and the heirs of his body, remainder over. The niece, *A. L.* and her husband, *E. W.* having suffered a recovery, and having died without issue, the daughter of the nephew, *C. L.* and her husband, claimed under the devise, in tail, to the nephew, *C. L.* and Lord MANSFIELD, in delivering the judgment of the court, stated the single question to be, "*Whether the testatrix* intended *to give her nephew, C. L.* "*and the heirs of his body, the remainder or reversion after* "*the death of herself, and E. W. and A. L. his wife, and* "*of the heirs of their two bodies, and also of the heirs of* "*A. L.'s body by any second husband, or whether she* "*meant to give him an estate in possession* (*a*)?" The court held that the devise was clearly future, and that, being limited on the indefinite failure of issue of the niece, *A. L.* it was too remote. This case is directly in point. The same argument which has been used on the present occasion, was ap- [501] plicable then; for it might have been said, that, either the niece, *A. L.* must die without leaving issue, and then the nephew, *C. L.*'s estate would vest at the death of a person *in esse*, or, if she had issue, the executory devise to the nephew, *C. L.* would immediately vest as a remainder, and might be barred when the issue came of age. But, either that argument was rejected by the counsel, as of no weight, or was urged without success.

In reply, on the *first* head, the cases of *Snow* v. *Cutler*, and *Moore* v. *Parker*, were insisted on, as containing two successive opinions, of four judges, that estates limited by different conveyances, cannot unite; and this without any distinction, whether moving from the same person or not.

On the *second* head of argument, it was observed, that the position laid down on the other side,—that, if the words "*heirs-male of the body of Thomas,*" were construed to be words of *purchase*, then if *Thomas* left an eldest son, and *he* should die without issue, no younger son of *Thomas* could take,—was only founded on a *dictum* of counsel, in *Shelley*'s case, as reported by *Coke* (*b*), but was not recognized by the court in that case; and that the contrary, *viz.*—that in such case, the second, third, and other younger sons, would take, in tail, upon the death of the first, or other elder son, without

(*a*) 2 Burr. 877. (*b*) 1 Co. 104. *a*, *b*.

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without issue,—had been frequently held to be law, both before, and since; particularly in *John de Mandeville's* case (c), in *Hodgkinson* v. *Wood* (d), in *Southcot* v. *Stawell* (e), and, very solemnly, by Lord *Macclesfield*, in *Trevor* v. *Trevor* (f), whose decree, in that case, was affirmed in the House of Lords. As to an implied estate-tail to *Thomas*, upon what ground could such implication be made, when he had an express provision, by the deed, which which was taken notice of, and recited, in the will? Could it be seriously contended, that the will meant to pass any thing, during the life of *Thomas*, when the very beginning of the devise was, "*I devise from and after his, (Thomas's) "decease?*" The subsequent words could not admit of the interpretation attempted to be put upon them. After the limitation to the heirs male of the body of *Thomas*, the devise went on to the second, third, fourth, and fifth sons, successively, "as *they* are in priority of birth." It could not be said that the word "*they*" extended to *Thomas*, and, if not, it would be impossible, by any natural construction, to carry the expression used afterwards in the same sentence—*viz.* "*the elder of my said sons*—" beyond those sons the testator was then speaking of, *that is*, his second, and other younger sons, exclusively of *Thomas*.

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The *third* head, of an immediate devise to the second son, was, in a great measure, deserted, in the reply on the first, and in the course of the second, and third, arguments.

On the *fourth* head, *viz.* that the limitation was good, on an implied double contingency, or rather, (for that was the ground chiefly relied on,) that it was not, on any contingency, too remote to be supported as an executory devise, they still urged their former reasoning, 1. As to the double contingency, they observed, that, in *Harris* v. *Barnes*, though the first estate was a term, the limitation over was of the inheritance; and, that, in *Baldwin* v. *Karvér*, a double contingency was implied, in respect to real property, although the first limitation was not in fee-simple. 2. As to the limitation being too remote, they insisted on *Stephens* v. *Stephens*, as in point, and suggested that there must have been some omission, or mistake, in the account of the judgment of the court, in the printed report of *Goodman* v. *Goodright*. In the case of *Lanesborough* v. *Fox*, the executory devise was, after an indefinite failure of the heirs-male of the testator, without any previous limitation to those heirs-male; which was clearly

(c) Co. *Littl.* 26. *b.*

(d) *C. B. M. Car.* 1 *Cro. Car.* 23.—*Hill*, serjeant, observed, that, in one part of this report, *William* is printed instead of (*Qu.* whether *Francis* or *Thomas.*)

(e) *C. B. M.* 28. & *E.* 9 *Car.* 2. 1 *Mod.* 226. 237. 2 *Mod.* 207.

(f) *Canc. T.* 1719. 1 *Eq. Ca.* 387. 1 *P. Will.* 622.

clearly too remote; because, as the limitation over could never have become a vested remainder, even if the testator had had heirs-male after the issue of *James* was spent, it could not have been barred by a recovery. To make the present like that case, the devise to the heirs-male of *Thomas* must be expunged from the will, and then, it was admitted, that the devise over would be void; and if the court, in *Goodman* v. *Goodright*, decided, (as it is stated in some manuscript notes of the case,) that the *first* devise to the heirs of the body of the niece, by any second husband, was void, because limited on an indefinite failure of her issue by her then husband, there being no previous estate limited by the will, to such issue, the determination was similar to that in *Lanesborough* and *Fox;* consistent with that in *Stephens* v. *Stephens;* and did not at all militate against the validity of the devise over in the present case: for, if the *first* devise in that case was void, as being too remote, the second to the nephew, (which was that on which the question arose,) must fall to the ground of course.

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After the second argument *(a)*, Lord MANSFIELD said, there was no doubt what the intention was; the only question was, if that intention could be fulfilled, consistently with the rules of law. He desired the counsel would see if they could find any cases, besides that of *Baldwin* v. *Karver*, where a double contingency had been implied in a case of real estate. As to *Baldwin* v. *Karver*, he thought the decision had not gone upon that point; and he had always considered it as the settled doctrine, since the case of *Forth* v. *Chapman*, that a double contingency may be implied as to personalty, but not as to real property.

A few days afterwards *(b)*, his Lordship said, he had directed the certificate of the court, in *Baldwin* v. *Karver*, to be searched for, and copied. He then read it; and it thereby appeared, that, although the court had suspended their opinion, and given the heir at law, and personal representative, leave to be heard by their counsel, against the validity of the devise to the grand-children, *they* did not instruct counsel to object to it, and, therefore, the court avoided the question, and only gave their opinion on the point between the different grand-children, on the supposition that the devise over was good [1].

On

(a) H. 20 *Geo.* 3. *Tuesday*, 8 *Feb.* 1780.

(b) Friday, 11 *Feb.* 1780.

[1] BALDWIN *and Others* v. KARVER *and Others*.

This was a case sent, under an order of the court of Chancery, (dated 26th *January*, 1774,) for the opinion of this court. The material part of the case was: That *Richard Ashwin*, by his will, dated the 8th of *June*, 1756, after charging his real estate with an annuity of £80 to his wife, for life, and giving her his household furniture, and £2000, and £500 to his

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On *Friday*, the 14th of *April*, 1780, his Lordship having asked *Hill*, serjeant, whether he had been able to find any case of real property, where the court, on the words "*in default of such issue*," had implied a restriction to "*issue living at the death of the father*," or, where a double contingency

his nephew *John*, and several other legacies to different relations; devised his real estate, subject to the said annuity, and all the rest and residue of his personal estate, to trustees, (whom he also made his executors,) their heirs, executors, and administrators, in trust, that they should stand seised and possessed thereof. "To the use "of the heirs-male of the body of my "nephew, *John Ashwin*, and in de- "fault of such issue-male, then to "the use of the heirs-male of the "body of my nephew, *Richard Ash-* "*win*, and in default of such issue- "male, then to the use of all and "every the grand-children of my late "brother, *John Ashwin*, and the "grand-children of my late sister, "*Sarah Morris*, to hold all and sin- "gular the said lands and premises, "to them the said grand-children of "my said brother and sister, and "their heirs, as tenants in common, "and not as joint-tenants, and my "said personal estate, and effects, to "be equally divided amongst them "share and share alike;" That, by a codicil, bearing even date with the will, and attested by the same witnesses, stating that he had omitted in the will "to dispose of the produce, "interest, and increase of the sur- "plus and remainder of his real and "personal estate," he directed, that his trustees should pay "all the in- "terest, produce, and increase that "should, from time to time, arise, or "be made, of his said real and per- "sonal estate, to his wife, and to "his nephews, *John* and

"*Richard Ashwin*, share "and share alike, during "their three natural lives, with sur- "vivorship between them;" That he made several other codicils, which did not vary or alter the will; That he died on the 6th of *November*, 1758, leaving his nephew *John* his heir at law; and afterwards his wife died, and also the nephews, *John* and *Richard*, without issue, *Richard* having been the survivor; That, at the time of making the will, there were two grand-children of his sister, *Sarah Morris*, and six of his brother *John*, and that all the nine survived the testator; That one grand-child of the brother *John* was born after the will, and twelve more after the testator's death; and all before the death of *Richard* the nephew. The question stated by the court of Chancery was, "Whether all, or any, and which, "of the grand-children of the testa- "tor's late brother, *John Ashwin*, "and of his late sister, *Sarah Morris*, "were intitled by the devise?" The bill was filed by two grand-children of the sister, born before the will, against *Karver*, the surviving trustees, and all the other grand-children, or their representatives. The case was argued twice, first by *Dunning*, for the plaintiffs, and *Mansfield*, for the defendants, and afterwards by *Pepys*, for the plaintiffs, and *Wallace*, for the defendants. The words of the certificate were as follows:

"Having heard counsel on both "sides, and considered this case, a "doubt occurred, whether the devise "of the real estate, as it stands upon "the will alone, was good, and if it "was coupled with the codicil, whe- "ther the absolute property of the per- "sonal estate would not vest in *John*, "and therefore we directed notice to "be given to the heir at law of the "testator,

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contingency [2] had been implied, *viz. to the issue, if there should be any, and if none, to the devisee over*, he said, he had not met with any [F 4]; and, thereupon, his Lordship delivered the opinion of the court, to the following effect:

" testator, and the personal representative or next of kin to *John*, " that they might be heard by counsel, if they pleased. But, the " cause having been postponed to " this term, and no counsel appearing for them, we have thought proper to give our opinion upon the " question, as between the grandchildren themselves, and, as they " were all in being at the death of " *Richard*, we think they are all " equally intitled.

" Mansfield,
" R. Aston,
" E. Willes,
" W. H. Ashhurst [† 107]."

June 23, 1765.

[2] A *double contingency*, in the sense in which the expression was used in this case, is where an estate in trust, or by way of executory devise, is so limited, that the time when it is to vest in possession, will, on one event, fall within the limits allowed by law, and, on another, will exceed them. It may be said, however, that, in many other cases of future limitations, (indeed, in by far the most usual sorts of them,) there is a *double contingency*. Thus, suppose an estate is limited to *A*. for life, remainder to *B*. in tail, remainder to *C*.; here the time when *C*.'s estate shall vest in possession, depends on a double contingency. 1. If *B*. die, without issue, before *A*. it will vest immediately on the death of *A*. 2. If *B*. outlive *A*. it cannot vest till after the estate-tail in *B*. is at an end.

Perhaps there may be some use in the following distribution of estates limited over after other preceding limitations. They may be divided into three classes.

1. Such as can take place *in the alternative only*.

2. Such as can take place *in succession only*.

3. Such as may take place, either *in the alternative*, or *in succession*.

1. Of the first class are all those, where, if the *first* estate ever vest, *they* cannot; so that they are only good upon the alternative of the first never taking effect. This happens where there is a trust, or devise, of personal property, to the heirs of the body, or the heirs of *A*. and, in default thereof, to *B*., as in *Higgins* v. *Dowler (a)*. *Stanley* v. *Leigh* (*b*), &c. Or where there is, in real property, a limitation over to *B*. after a contingent fee-simple to *A*. as in *Luddington* v. *Kime* (*c*). *Doe* v. *Holme*

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[† 107] This case of *Baldwin* v. *Karver*, has been since reported, *Cowp.* 309.

(*a*) *Canc. M.* 1707. 1 *P. Will.* 98.
(*b*) Cited *supra*, p. 494. *Note (a)*.
(*c*) Cited *supra*, p. 265. *Note (c)*.

[F 4] *Acc. per Buller*, J. *Doe* v. *Perryn*, 7 *T. R.* 494.

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Lord MANSFIELD, (having stated the special verdict,)—The case then lies in a very narrow compass. If the eldest son was tenant in tail, the recovery was good, and barred the limitations over; or, if the limitations over were too remote, he was entitled, as heir at law. As to his being tenant in tail, a considerable objection has been made, *viz.* that he was tenant for life under *the settlement*, not under *the will;* and several authorities have been cited to prove, that the previous and subsequent estates, when limited by different

Holme (d), *Goodright* v. *Dunham* (e), &c. Estates of this class are often called limitations on a *contingency with a double aspect;* or, with less quaintness, on a *double contingency.* They have also been sometimes denominated *concurrent*, or *contemporary* limitations (f). But I have already remarked, that, in many of another sort, there is, as much as in these, a *double contingency;* and they are certainly not aptly described by the words *concurrent*, or *contemporary.* Those epithets are rather expressive of estates which take effect at one and the same time. They might, with propriety, be applied to the interests which vest in coparceners, tenants in gavel-kind, or joint-tenants; or to such remainders over as those limited, in the case of *Carter* v. *Barnardiston*, to *Thomas Styles* and sir *Thomas Barnardiston;* for there, after the previous contingent fee, in the manors both of *A.* and *B.* to a third person, there was a limitation of the manor of *A.* to the one, and of the manor of *B.* to the other, to take effect at the same time.

2. The second class consists of those which can never vest, unless the preceding estate take place before them, and then not till the other is either spent, or otherwise determined. Of this sort there are examples in the cases of *Davis* v. *Norton* (g), and *Watson* v. *Shippard* (h) [† 108]. They are, however, very rare. It is certainly a *general* rule, "Where there "is a remainder, or conditional limi-"tation over, that, if the precedent "limitation, *by what means soever*, is "out of the case, the subsequent li-"mitation takes place." Indeed, Lord *Hardwicke*, in *Vezey's* report of *Avelyn* v. *Ward* (i), is stated to have said, that he knew of *no case* to the contrary. But the two I have mentioned are clearly of this sort. They are often said to be *expectant* on the first estate.

3. All other limitations after previous estates, belong to the third class; and, in all of them, as in all of the first, there is a double contingency, as already explained. If the previous estate take effect, these await its determination, and then vest in possession. If the other contingency happen, that is, if the first estate never vest, they take place immediately at the time when they first ought to have vested.

A devise

(d) Cited *ibid. Note (d).*

(e) *B. R. M.* 20 *Geo.* 3. *supra*, p. 264.

(f) *Supra*, p. 265. 1 Ld. *Raym.* 208.

(g) Cited *supra*, p. 77. *Note* (x).

(h) *Supra*, p. 75.

[† 108] *Vide*, also, in the case of a term, *Estcourt* v. *Weorry*, *B. R. T.* 9 *Will.* 3. *Comb.* 437.

(i) 1 *Vez.* 422.

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different conveyances, cannot unite. But, if they did not unite in this case, then the first limitation in the will was an executory devise, which remained contingent till the death of *Thomas*, and the estate given to the second son was also executory, and, being after an indefinite failure of

A devise after failure of the *issue*, or the *heirs* of *A. without* any previous estate to such issue, or heirs, is void in its creation, whether it be of real or personal property. Such a devise, *with* a previous contingent limitation, to the issue or heirs of *A.* falls under the first, or third, of the above classes, and is [F 5] not void in its creation. The reason of the difference may be thus explained: When there is no previous estate limited, if *A.* should have heirs, or issue, they might last for ever, and while they did, there would be nobody who could bar the estate limited over; and, therefore, a perpetuity might take place, which the law will not suffer. But, where the estate is previously given to the heirs, or the issue of *A.* and, (if future,) is limited to vest within the legal boundaries, in point of time, the principle of preventing perpetuities does not render it necessary to hold the devise over to be void in its creation. For, to consider: 1. The case of personal property; if the first estate vest, (whether limited to issue, or heirs, is, there, exactly the same thing,) the entire interest and dominion is thereby ex-

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hausted, and there is nothing left upon which the subsequent limitation can attach, which, therefore, becomes immediately, by necessary operation of law, a mere nullity: 2. In the case of real property; if the first limitation is to *heirs*, the whole interest and dominion, in the same manner, vests with that estate; if it is to *issue*, (or *heirs of the body*, for I use those words as synonymous, because, in wills, they generally are so,) then, upon its vesting, such an interest is acquired, as enables the first taker, if he pleases, by the legal ceremony of a recovery, to convert his qualified, into an absolute, interest and dominion, and thereby, in like manner, render the devise over a mere nullity. This last was the case in the present cause of *Doe* v. *Fonnereau.* The point, which is so clear, upon the principles laid down by Lord *Mansfield*, in delivering the opinion of the court, was never before fully developed, and, directly, and explicitly, decided. Yet, to account for the certificate of the judges in *Stephens* v. *Stephens*, we must suppose them to have held the same opinion, on this precise identical point. For all the devises there, as here, were executory; the

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[F 5] See Mr. *Powell's* note to the fifth edition of *Fearne Cont. Rem.* vol. II. p. 493, where he states that this position is erroneous, and contrary to the doctrine established by his author in the text. He attributes the error to a misconception of the principle on which Lord *Mansfield* decided, which he maintains to have been, that the limitation after the death of *Thomas Fonnereau* would, in *either* case, have been a good and valid devise, *viz.* whether he left issue, or not: whereas the doctrine of double contingencies, as explained in the beginning of the present note, is, that in one event the estate would vest within legal limits, but in the other, not.

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of issue [F 6], was too remote; therefore, *quâcunque viâ datâ*, the devise by *Thomas*, under which the defendant claims, was good.

On *Tuesday*, the 18th of *April*, 1780, his Lordship said, the court had decided that the devise to the second son was void,

the limitation in fee to Sir *Richard*, (the testator's brother,) was after an indefinite failure of the issue of the grand-daughters, to whom a previous estate, in tail, was limited; and the certificate expressly says, that when the previous limitations should be spent, the estate would go over to him, or vest in him, by virtue of the last remainder to him in fee (*a*). But, to go a little farther, if what was argued by the counsel for the plaintiff, in this case, is law, (of which I believe there is no doubt,) *viz.* that the words "heirs of the body of *Thomas*," were words of *purchase*, and that the eldest, and other sons of *Thomas*, would have taken *successively*, in tail-male, under those words, What else were the contingent estates to the younger sons of *Thomas*, but executory devises, after the indefinite failure of the issue-male of their elder brother? According to *John de Mandeville's* case (*b*), the second son of *Thomas*, (and so of the others,) must indeed have claimed, as heir-male of the body of his father, *per formam doni*, yet, certainly not by *descent*, for as the eldest son took, so must he by *purchase*.

It may be observed here, as not foreign to the case I am reporting, that the rule in *Shelley's* case is not perfectly accurate, in saying that, when there is, in the same conveyance, a limitation to the ancestor, for life, and, mediately or *immediately*, to his heirs in fee, or in tail, the words, "*his heir*," are not words of *purchase*. When there is an intermediate vested remainder, as in *Coulson* v. *Coulson*, those words are words of *purchase* [F 7] They do not qualify the estate, or describe the quantity of interest, given by the first limitation, but vest *another* estate, *viz.* a remainder in fee, or in tail, in the tenant for life. They, at the same time, indeed, express the quantity of that other estate, but so do

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(*a*) Cases *temp. Talb.* 233.

(*b*) Cited *supra*, p. 501, *Note* (*c*).

[F 6] *Acc. Habergham* v. *Vincent*, 5 *T. R.* 92, *Venables* v. *Morris*, 7 *T. R.* 342, *Wood* v. *Baron*, 1 *East*, 259.

[F 7] Mr. *Fearne Cont. Rem.* 103, has combated this position, and defended the expressions of Lord *Coke* in *Shelley's* case. He maintains that the words "his heirs" are words of limitation, whether there be such intermediate estate between the estate for life and the remainder, or not. The result of his reasoning is, that in the former case the first taker has an estate in fee *divided*, and subject to the intermediate estate, and in the latter case he has an *entire* estate in fee. It appears that in both cases the words "his heirs" qualify and enlarge the estate first given; and that it is a confusion in terms to call those words of purchase, which give an estate not *originally* to the heirs, &c. described, but through the *medium* of, or by *descent* from, the ancestor.

void, on the authority of the case of *Goodman* v. *Goodright*, as reported by Sir *James Burrow*, but that they had since seen a manuscript note of that case, taken by *Kenyon*, which assigned a ground for the determination different from that stated by Sir *James Burrow* [3]. That the court, upon this, entertained considerable doubts concerning the opinion delivered a few days before, and desired to have the case argued again.

This day, his Lordship delivered the ultimate opinion of the court, as follows.

Lord

do other words of purchase, in general, express the quantity of the interest: nor can it well be otherwise. The correct method of expressing the proposition would be, that the words, in such cases, do not limit any estate *to the heirs as purchasers*. *Rolle* seems to have intended to make this distinction, in the second volume of his Abridgment, *title Remainder*. He divides the rule laid down in *Shelley's* case, into *two* paragraphs; and says, in the first, *viz.* with regard to an *immediate* limitation to the heirs, "The "words 'the heirs' are words of *li*-"*mitation*, and not of *purchase* (a)." But, in the other, he changes the expression. "When the ancestor, by any gift or conveyance, takes an 'estate of freehold, and, in the same 'gift or conveyance, there is an estate, "in fee, or in tail, to his right heirs *mediately*, (*viz.* where an estate for life, or in tail, is interposed between the said estates) *this remainder shall attach in the ancestor*, and shall not be in abeyance (b)."

[3] I have been favoured by Mr. *Kenyon* with a copy of his note of that case, which is much fuller than either the report by Sir *James Burrow*, or that since printed, in the first volume of *Blackstone's* Reports. It agrees, however, in the material part of the judgment of the court, with Mr. Justice *Blackstone's* account; and it appears, by both, that the decision went upon the alternative, either of the niece having taken an estate-tail by implication, or of the *first* devise (*to the heirs of the body of the niece by any other husband*,) being too remote, and, of course, the *second*. The court thought it unnecessary to determine, whether the niece took an estate-tail by implication; and according to Mr. *Kenyon's* note, Lord *Mansfield*, in giving judgment, said, "The whole "of the case comes to this: Whether "Mrs. *Mostyn*, (the testatrix,) in-"tended, by the devise, *to give the* "*heirs of the body of her niece A. L.* "*by a second husband*, the remainder, "reversion, or estate, (whatever it is "called,) after the deaths of herself, "*E. W.* and *A. L.* and failure of issue "between them: or whether she "meant to give an estate in posses-"sion, to the issue of *A L.* by a se-"cond husband." His Lordship, therefore, (being clear that it was not an immediate devise,) put the case entirely on the remoteness of the *first* devise. The manner in which he is said to have stated the question, in 2 *Burr.* 873, is mentioned *supra*, p. 500, 501.

(a) 2 *Roll. Abr.* 417. *Remainder* (G) *pl.* 5. (b) *Ibid. H. pl.* 3.

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*[508]

Lord Mansfield,—After the second argument, and upon consideration of the case, we were of opinion, and gave judgment accordingly, that either *Thomas* was tenant* in tail, by connecting his estate for life, in the deed, with the limitation, in the will, to his heirs male, (without saying it was our opinion that they could unite) or that the limitation over was too remote, as being after an indefinite failure of issue; and we could find no case where the court, in a will of real property, had raised an implication to confine the failure of issue to the life of the ancestor. But, afterwards, turning the cases on this subject in our minds, and considering the reasons on which they proceed, namely, to prevent perpetuities; we stopped the judgment, and desired the case might be again spoken to. It has been argued a third time, and we have changed our opinion, and shall give our reasons. The rule is unquestionable, that there cannot be an executory devise after an indefinite failure of issue. But that is not the case here. We all think, that the estate for life being by one instrument, and the limitation in tail by another, they cannot unite, and that the heirs-male of *Thomas* would have taken by purchase [F 8]. This is a settled point; and we lay it down as our clear opinion. What are the limitations here? They are, to the heirs-male of the body of *Thomas*, and, in default of such issue, to the second, and other sons. There are two ways, in form of law, in which this last limitation may take effect. 1. If *Thomas* dies, leaving issue-male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2. Suppose the other alternative, (which really happened,) that *Thomas* has no son, then it is an executory devise to the second son, if *Thomas*, at his death, leave no issue-male. This is within the limits established by law to prevent perpetuities. We have looked into the cases, to see how far this reasoning upon principle can be supported by authorities; and we think there are three which go a great way. 1. In *Stephens*

[F 8] The principal case has always been considered as a leading authority for this qualification of the rule in *Shelley's* case, *Fearne Cont. Rem.* p. 98.

So, where one instrument was a will, containing a limitation to such person as the testator should appoint by deed executed and attested, and the other instrument was a deed conformable to such description. *Habergham* v. *Vincent*, 4 *T. R.* 92.

So, if the first estate be an equitable estate, and the second a legal estate, they cannot unite. *Silvester* v. *Wilson*, 2 *T. R.* 444.

But if the second instrument be only the execution of a power contained in the first, it is otherwise; for then the second instrument is to be considered as forming part of the first. *Venables* v. *Morris*, 7 *T. R.* 342. See *Fearne Cont. Rem.* 99.

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phens v. *Stephens*, the court took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child, and alienation was not restrained for any longer time in *Stephens* v. *Stephens*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one. An obvious objection to the alternative in this case is, that, if the limitation over is a remainder, it cannot be turned into an executory devise. *That* is true, if it ever vest as a remainder. But here it might, or might not, upon a contingency; and it never did. 2. So, in *Hopkins* v. *Hopkins*, Lord TALBOT decided, in support of the intent, that a limitation, which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. This he did upon principle, without precedents; and a great estate is now held under his determination. 3. *Brownsword* v. *Edwards*, is another strong instance where it was held that a devise may operate either way, according to the event (*a*). These are the authorities which go along with the principles I have stated, and enable us to support the intention of the testator. As to *that*, there is no doubt that he meant to give successive estates in tail-male.

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Judgment for the plaintiff.

MAURICET *against* BRECKNOCK.

Wednesday, 22d Nov.

It is a general rule, that the court will not set aside a verdict, in an action for a tort, on account of the smallness of the damages.

IN *Trinity Term* last, (on *Tuesday*, the 30th of *May*,) *Baldwin* moved for a rule to shew cause, why the inquisition taken upon the writ of enquiry in this cause should not be set aside, on account of the smallness of the damages. It was an action on the case, for maliciously suing out a commission of bankruptcy against the plaintiff, and also for maliciously holding him to bail for £1020. The defendant let judgment go by default, upon which a writ of enquiry was executed, and the jury gave only £5 damages. The affidavit upon which *Baldwin* moved, stated, that the plaintiff's attorney had proved, before the jury, that his bill of costs to the plaintiff, for superseding the commission of bankruptcy, amounted

(*a*) *Canc.* 20 *March*, 1750, 1. 2 *Vez.* 249.

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amounted to upwards of £30, and that no evidence was produced on the part of the defendant. He cited *Markham* v. *Middleton* (a), where the action being for a tradesman's bill amounting to £333, and the enquiry jury having given only a penny damages, the verdict was set aside [1].

The court, after some difficulty, granted the rule.

This day *Howorth* shewed caused, and insisted upon it, as an established rule, that the court will never set aside a verdict on account of the smallness of the damages.

The *Attorney-General*, for the plaintiff, observed, that every rule of that sort admits of exceptions [2]; that the verdict here, would appear to be glaringly absurd, if the nature of the action were considered; and that the defendant, by suffering judgment to go by default, had confessed that he had acted *maliciously*; (the proof of malice being necessary to maintain the action).

Lord MANSFIELD,—He has confessed *malice*, in point of *form*, and merely for the purpose of letting the plaintiff in, to prove the degree of injury he has received.

The rule discharged.

(a) *B. R. T.* 19 *Geo.* 2. 2 *Str.* 1259.

[1] But, in that case, the plaintiff's attorney produced a witness, who had told him, he could prove the bill, and who, when the jury was sworn, refused to give evidence, and the sheriff thought he could not adjourn. The court thought, under such circumstances, the sheriff might, and ought to have *adjourned*, on the authority of several cases there cited. The smallness of the damages, therefore, was not the ground of that determination.

[2] Thus, if the smallness of the damages arises from a mistake *in point of law*, of the *sheriff*, (as in *Markham* v. *Middleton*,) or of the *jury*, (as in *Woodford* v. *Eades*, 1 *Str.* 425.) the court will set aside the verdict [F].

[F] But in trespass for mesne profits, where defendant was bankrupt, and the jury had not given the costs of the ejectment in their damages, the court said, plaintiff might prove a debt for them under the commission, and declined, in the exercise of their discretion, to interfere. *Gulliver* v. *Drinkwater*, 2 *T. R.* 261.

1780.

NOBLE and Another *against* KENNOWAY.

Wednesday, 22d Nov.

An under-writer is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates.—To prove the manner of conducting a particular branch of trade at one place, evidence may be given to shew the manner in which the same branch is carried on at another place.

THIS was an action on a policy of insurance, which was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiffs. On *Thursday*, the 9th of *November*, *Dunning* obtained a rule, to shew cause, why there should not be a new trial; and this day, the case was argued, by *Lee* and *Baldwin*, for the plaintiffs, and the *Attorney-General*, and *Dunning*, for the defendant.

The case, and evidence, upon Lord MANSFIELD's report, appeared to be as follows: The insurance was upon the ships, the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, and upon any kind of goods and merchandizes; and also, on *the ships* till they should be arrived at their port of discharge, and should have moored at anchor twenty-four hours, and *on the goods and merchandizes, until the same should be there discharged, and safely landed*. By a clause in the policy, money advanced to the *fishermen* was insured. The *Anne* arrived safe on the coast of *Labrador*, on the 22d of *June*, and the *Hope* on the 14th of *July*, 1778. From the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except at leisure hours, (partly on *Sundays*,) such things as were immediately wanted. On the 13th of *August*, an *American* privateer entered the harbour, (*Temple Bay*,) and took both the vessels, there being nobody at that time on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay, in unloading the cargoes, in consequence of which they had been exposed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and on the usage of the trade. They called one *Attwick*, the captain of the *Anne*, who said, that he had been the same voyage three times in the three last years, and that they had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods, if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one *French*, to prove the custom of the *Newfoundland* trade.

[511]

This

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This evidence was objected to; but Lord MANSFIELD admitted it; and the witness swore, that in the *Newfoundland* trade, it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo, on board, at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt, and provisions, it is taken out gradually, for curing the fish, and for consumption. This witness was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. One *Hunter* was then called, who proved, that, some years since, he used to send vessels of his own, and also chartered vessels, to *Labrador*, and that it was usual in chartering vessels, to stipulate, that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer, in fact, and that it was not so easy to discharge a cargo at *Labrador*, as at *Newfoundland*.

[512]

In support of the rule for a new trial, it was contended, that, as the policy on the ships expressed twenty-four hours after their safe arrival, no under-writer could suppose, that he was to be liable for the goods for fifty or sixty days longer. There was nothing that bespoke an insurance upon a trading voyage. The only reasonable construction of the policy is, that the goods are to be protected until they can be reasonably and conveniently landed. As to the evidence concerning the *Newfoundland* trade, it ought not to have been admitted. In cases of great public branches of trade, such as that to the coast of *Guinea*, the general usage may be given in evidence, and the under-writer is, perhaps, bound to take notice of it; yet on policies on *Guinea* ships, it is most usual to insert a special clause for protecting the ship, and goods, during her stay. This, though it may be unnecessary, shews, at least, that where there is no general usage, the under-writers shall not be liable, without an express stipulation. But, here, there can be no general usage; the trade has been established but a few years, and is entirely in the hands of the plaintiffs. *Newfoundland* and *Labrador* are distant and discontiguous, and, although the object of the voyages to both, may be the fishery, yet the fishing trade is conducted very differently at different places. Would the practice at *Greenland*, *Nova Zembla*, on the coast of *Scotland*, or in the new whale fishery in the *Mediterranean* [† 109], be evidence in this case? If a merchant, who carries on the fishery on the coast of *Labrador*, chooses to adopt the methods and practice in use at *Newfoundland*, he certainly may; but, till this becomes generally known, the under-writers are not bound to take notice of it. There will be no inconvenience to the trade, by a decision in favour of the defendant, because a special clause may be inserted in future policies.

On

[† 109] *Qu.*

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On the other side it was argued, that, what is the usage in a similar branch of trade, is evidence. That it was a fair presumption, that a new branch recently established, would be conducted in the same manner with other branches of the same business. That, in a late case of *Puller* v. *Offley*, which was tried at *Guildhall*, evidence of the general practice in the *Guinea* trade had been admitted, upon the construction of a policy, on a ship engaged in a particular branch of that trade. The insured could not, it was admitted, take an unusual and unreasonable time to unload, and, if it had appeared that the time employed in this case, had been longer than what was usual and reasonable at *Newfoundland*, the plaintiffs, perhaps, would not have been entitled to a verdict; but the jury were to judge, under the circumstances, whether the time was unreasonable, and they thought it was not.

[513]

Lord MANSFIELD,—The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance, here, is on the ships, and the *goods till landed*. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided, by knowing the usual practice of the trade. Every under-writer is presumed to be acquainted with the practice of the trade he insures, and *that* whether it is established, or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject was properly admitted, to shew the nature of the trade [☞]. The point is not analogous to a question concerning a common-law custom.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I think there was sufficient evidence, without calling in aid the usage in the *Newfoundland* trade; for it appeared, on the face of the policy, that the fishery was the purpose of the voyage. But I think the evidence objected to was properly admitted. If it can be shown, that the time would have been reasonable in one place, that is a degree of evidence to prove, that it was so in another. The effect of such evidence may be taken off, by a proof of a difference of circumstances. It is very true, that the custom of one manor is no evidence of another; that has been determined in many cases; but the point here is very different; it is a question concerning the nature of a particular branch of trade.

The rule discharged.

[☞] *Vide Ford* v. *Hopkins*, N. Pr. 283. *Ekins* v. *Mackhole*, *Canc.* 1753, *H.* 12 *W.* 3. *cor. Holt, Ch. J.* 1 *Salk.* *Ambl.* 184. 186.

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RUSSEL *against* LANGSTAFFE.

An indorsement written on a blank note or check, will afterwards bind the indorser for any sum and time of payment which the person to whom he entrusts the note chooses to insert in it.

ONE *Galley* having had frequent money transactions with the plaintiff, who was a banker, and having overdrawn his cash account, the plaintiff suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve. Upon this, *Galley* applied to the defendant, and he indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank; *i. e.* without any sum, date, or time of payment, being mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different sums and dates, as he chose, and the plaintiff discounted the notes. One of them was made payable on the 22d of *September*, two on the 27th of *September*, and two on the 4th of *October*. These notes not being paid when they became due, the plaintiff, on the 14th of *October*, called upon the defendant, as indorser, for the payment of all of them, and upon his refusal, brought this action, which was tried, before HOTHAM, *Baron*, at the last *assizes* for the county of *Durham*. It appeared that *Galley* had become a bankrupt on the 20th of *September*, and that, on the 27th, the defendant had been present at a meeting of his creditors. It also appeared that *Russel* knew the notes were blank at the time of the indorsement. The plaintiff and the defendant lived in the same town.

For the defendant, at the trial, it was objected, 1. That these notes being blank at the time of the indorsement, they were not then promissory notes, and that no subsequent act of *Galley* could alter the original nature or operation of the defendant's signature, which, when it was written, was a mere nullity. It was also objected, 2. That the notice of the non-payment by the drawer, was not given soon enough to the indorser[(*a*)].

The judge being of opinion with the defendant, on the first point, he directed the jury accordingly, and they found a verdict for him.

On *Wednesday*, the 8th of *November*, *Arden* obtained a rule to shew cause, why there should not be a new trial; which was argued this day, by the *Attorney-General*, *Lee*, and *Scott*, in support of the verdict, and *Dunning* for the plaintiff.

1. The *Attorney-General* gave up the *first* point, but *Lee* said he thought it of consequence enough to be argued. It never

[(*a*)] *Vide Bickerdicke* v. *Bellman*, *B. R. M.* 27 *Geo.* 3. 1 *Term Rep.* 405.

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never had been determined, he said, and deserved consideration. The copper-plate checks in this case, without sum, or date, were mere waste paper, and *Langstaffe*'s name upon them had no more effect than if written on any other blank piece of paper. An indorsement supposes a bill, or promissory note, then actually existing; and if a party take an indorsed bill, or note, knowing, at the time, that it was not the subject of an indorsement when the name was written on the back of it, he is not injured if he is afterwards told, that he shall not be permitted to treat it as a bill or note. The very declaration, in this action, necessarily states a pre-existing note, previous to the indorsement; and such forms are not to be considered as useless, and without a meaning. How can the plaintiff be permitted to say, that, by this signature, the defendant contracted for a given sum, when he knows, that, at the time of the signature, he did not contract for any thing? This defence might not be competent, as against a third person, but it seems just and fair, as against the plaintiff, who was aware of the original nature of the transaction. 2. On the other point, they admitted, that what shall be deemed reasonable notice to an indorser, of non-payment by the drawer, ought properly to be decided by the jury [† 110]; but said it was well established, that such notice ought to be as early as possible. That, where the parties live at a distance, the notice ought to be given by the first post, though, if any thing delay the going out of the post at the usual time, *that* will be an excuse; but that, here, the parties lived in the same town, and no notice had been given till ten days after the time of payment, even in the case of the notes payable in *October*. As to the bankruptcy, it had been frequently ruled by Lord MANSFIELD, at *Guildhall*, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment [F 1], that the drawer, or acceptor, has become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends, or otherwise.

On

[† 110] *Vide* on that point, *Metcalfe* v. *Hall*, *B. R. T.* 22 *Geo.* 3. *Appleton* v. *Sweetapple*, *B. R. M.* 23 *Geo.* 3. & *Tindal* v. *Brown*, *B. R. T.* 25 *Geo.* 3. ☞ And S. C. *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 167. And *Scott* v. *Lifford*, 9 *East*. 347.

[F 1] This rule, requiring notice at all events, and notwithstanding a bankruptcy, is by the law of merchants, and obtains only between the parties to the bill: but it is not necessary, where the payment of a bill by the acceptor has been *guaranteed*, for the drawer to give notice to the *guarantee* after the insolvency of the principal. *Waddington* v. *Furbor*, 8 *East*. 242.

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On the other side, it was stated, by *Dunning*, that the jury, whose province it was to decide on the *second* point, were, upon that point, clearly with the plaintiff, and that *they had found a verdict for the defendant, in deference to the judge's opinion, on the other question. As to that question, he insisted that there could not be a doubt but the direction was wrong. It strengthened the plaintiff's case, that he knew the notes were blank when indorsed. For what purpose could he suppose the indorsements were made by the defendant, but to authorize *Galley* to fill them up with any sum he pleased, and to bind himself, as his security, to that extent. The declaration states the notes to have been made before the indorsements; so all declarations against indorsers must; but the defendant, by indorsing them, concluded himself from contending, or proving, that they were not filled up when he signed them.

*[516]

Lord MANSFIELD,—There is nothing so clear as the *first* point [F 2]. The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, "Trust "*Galley* to any amount, and I will be his security [☞]." It does not lie in his mouth to say, the indorsements were not regular. The direction having been wrong on this point, it is needless to go into the other.

The rule made absolute [1].

[☞] *Vide Collis* v. *Emet*, *C. B. H.* 30 *Geo.* 3. *H. Bl.* 313. 316. 319.

[1] Before there was an opportunity for a new trial, another action, between the same parties, and under similar circumstances, came on, before Lord *Mansfield*, at *Guildhall*, and a verdict being found for the plaintiff, the defendant submitted in this action, without going to a second trial.

Thursday, 23d Nov.

The KING *against* VAUGHAN.

When a person, against whom an attachment is prayed, positively answers and denies the charge, this court always refuse the attachment, without entering into the credit of the parties, or the probability of the evidence.

CAUSE shewn against a rule for an attachment against the defendant, for acting as an attorney of this court, after having been struck off the roll.

Lord

[F 2] *Acc. per Buller, J. Liekbarrow* v. *Mason*, 6 *East*, 22, *in not.* But where a bill of exchange was altered by the drawer after acceptance, without the privity of the acceptor, it was held that no action could be supported upon the bill in the hands of an innocent indorsee. (*Buller*, J. *contra.*) *Master* v. *Miller*, 4 *T. R.* 320.

Lord MANSFIELD stated the practice of the court to be, that, if the defendant, by his *affidavit*, fully denies the charge, on which the rule for an attachment was granted, *that* is sufficient; the weight of the evidence, or the credibility of what is sworn, is never considered; but if the defendant is hardy enough to swear falsely, he is left to be punished by indictment. In chancery, he said, they proceed differently: they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge.

In this case the court thought the charge was not sufficiently answered.

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The *Attorney-General*, and *Peckham*, for the prosecution. *Dunning*, and *Mingay*, for the defendant.

The rule made absolute [1].

[1] In *Trinity Term*, 21 *Geo*. 3. the defendant was sentenced to six months imprisonment in *Clerkenwell* prison.

KINNERSLEY *against* WILLIAM ORPE.

Thursday, 23d Nov.

A person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under 5 Geo. 3. c. 14.

THIS was an action of debt, by the owner of a fishery, for a penalty of £5, under the statute of 5 *Geo*. 3. *c*. 14. § 3 & 4. for killing fish in his fishery. The defendant was the servant of a doctor *Cotton*, who claimed a right to the fishery in question, and an action of trespass had been brought against some of his servants, by the present plaintiff, to try the right; which action was tried at *Stafford*, in summer, 1779, and a verdict found for the plaintiff. The defendant applied for a new trial in that cause, but it was refused (*a*). However, doctor *Cotton* not being satisfied, gave the plaintiff notice, that he should order one of his servants to fish in the same place, with the express view of procuring an opportunity to try the right again. He accordingly did so, and it was in obedience to his orders for that purpose that the defendant committed the act for which the present action was brought. This the counsel for the defendant offered to prove at the trial, and contended, that, when it should be proved, the plaintiff ought to be nonsuited, for that such an assertion of a right, was not an offence within the statute, there being an express exception in § 5. in favour of persons who shall have a "*just right or claim*." PERRYN, *Baron*, before whom the cause was tried, at the last assizes for *Staffordshire*, decided this point against the defendant, and refused

(*a*) *Kinnersley* v. *Orpe*, *supra*, p. 56.

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fused to hear the evidence. The plaintiff produced no other proof than the record of the verdict and judgment in the former cause of *Kinnersley* v. *Orpe*, to shew his exclusive right to the fishery. This evidence was objected to, on the part of the defendant, because the former action, and this, were not causes between the same parties, the name of the former defendant being *Thomas*, and that of the present, *William*. The judge, however, over-ruled the objection, and held that the evidence was not only admissible [1], but conclusive, (both the *Orpes* having acted under the authority of *Cotton*, who was the real defendant in both causes,) unless collusion could be shewn in obtaining the former verdict and judgment. This was not attempted; and the jury, agreeably to the judge's direction, found for the plaintiff.

On *Thursday*, the 9th of *November*, *Bower* moved for, and obtained, a rule to shew cause, why there should not be a new trial, on the ground of a misdirection in the several particulars above stated; and, this day, cause was shewn, by *Cowper* and *Swinnerton*.

Bearcroft was going to answer them, but the court told him, it was unnecessary. They thought the defendant ought to have been let in, to prove the notice by doctor *Cotton*, and that, if *that* had been proved, this would not have been a case within the act.

BULLER, *Justice*, observed, that, to construe it in the manner contended for on the part of the plaintiff, would be to read the clause of exemption, "*right and claim*," instead of "*right or claim*." The court also thought, that the record in the former cause, though admissible evidence, was not conclusive.

The rule made absolute.

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[1] "It is extraordinary that it "should ever have been, for a mo- "ment, supposed, that there could "be an *estoppel* in such a case. It "was not pleaded as such; neither "were the parties in the second suit "the same with those in the first. "The doubt seems rather to be, "whether the former record in the "action of trespass was at all *admis- "sible* in evidence upon the subse- "quent action for penalties." *Per* *Lord Ellenborough*, in *Outram* v. *Morewood*, 3 *East*. 346.; where the law on the evidence of verdicts is fully detailed.

1780.

BRANCH *against* EWINGTON.

Friday, 24th Nov.

In a common indenture of apprenticeship, under 5 *El.* c. 4. between the father, son, and master, the father is answerable for what is to be performed by the son.

ACTION of covenant on an indenture of apprenticeship, by the master, against the father, of the apprentice. The indenture, as stated in the *declaration*, was in the common form, under the statute of 5 *Eliz. c.* 4.; the plaintiff expressly covenanting to find the apprentice meat and lodging, the defendant to find him cloaths and washing, and the apprentice, that he would serve faithfully, *&c.* and for the true performance of all, and every, of the said covenants, each of the said parties bound himself to the other. *Breach* assigned, that the apprentice had absented himself from the service. *General demurrer.*

Peckham, in support of the demurrer, contended, that the parties were only bound for the express covenants which they had *severally* entered into. That it would be absurd to construe the general words so as to render the defendant liable for breaches of such of the covenants as were to be performed only by the son. The same construction would render the father liable to the son, or the son to the father, for those which the master was to perform. In all covenants, the intention is to govern. The master has other remedies besides an action of covenant against the apprentice, if he absent himself. He may, by application to the justices, have him punished, under 5 *Eliz. c.* 4. § 35.; or, if he wants compensation for the loss of service, he may compel him to make it up by subsequent service, under 6 *Geo.* 3. *c.* 25. If the construction contended for on the part of the plaintiff should prevail, parish officers will be liable for the breaches of similar covenants in parish indentures [1].

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Lord MANSFIELD stopped *Baldwin*, who was to have argued on the other side, and said, nothing was clearer than that the father was bound for the performance of the covenants by the son.

Judgment for the plaintiff [2].

[1] In parish indentures, under 43 *El. c.* 2. § 5. the parish officers do not covenant. *Vide* the form of such indentures, 1 *Burn's Justice*, 13th ed. p. 85.

[2] *Vide Whitley* v. *Loftus*, *B. R. M.* 10 *Geo* 1. 8 *Mod.* 190. which is directly in point, and was meant to have been cited by *Baldwin*.

Friday, 24th Nov.

WYLLIE *against* WILKES.

The penalty of a bond for securing an annuity having once been forfeited before a bankruptcy, the value of the annuity may be proved under the commission, and the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture and before the bankruptcy.

ACTION of debt upon a bond conditioned for the payment of an annuity to the plaintiff, for seven years, by quarterly payments, the first payment to be made on the 25th of *December*, 1774. The defendant, after craving *oyer*, and setting forth the condition upon the record,—which recited, that the annuity had been *agreed* to be paid to the plaintiff, in consideration of his having dissolved a partnership between himself and one *Oxlade*, a co-obligor in the bond with *Wilkes*, in order that *Oxlade* might take *Wilkes* into partnership,—*pleaded*, that he became a bankrupt, and a commission issued against him, on the 24th of *March*, 1777, that he afterwards obtained his certificate on the 5th of *January*, 1778, and that the cause of action accrued before he became a bankrupt. Upon this plea, issue was joined: and the cause came on for trial, before Lord MANSFIELD, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court, on a case which stated—That a quarter's [520] annuity became due on the 25th of *December*, 1776; That the arrears due on that day were paid on the 18th of *March*, 1777; and that the defendant became a bankrupt; that a commission issued against him, and he obtained his certificate, as stated in the plea.—The question for the opinion of the court was, whether the plaintiff's cause of action accrued before the bankruptcy.

The case was argued on *Tuesday*, the 14th of *November*, by *Wood* for the plaintiff, and *Dunning* for the defendant.

Wood argued as follows—The certificate is not a bar in this case. The plaintiff had no legal remedy on the bond, at the time when the commission issued, and therefore could not have been admitted as a creditor under the commission. All the instances in the court of chancery, where annuitants have been permitted to prove under commissions of bankruptcy, have been in cases where the bond has been forfeited, and thereby a legal remedy for the penalty has been acquired. Here the forfeiture which would have been incurred by the non-payment of a quarter of the annuity, on the 25th of *December*, 1776, was waved, and done away, by the payment and acceptance of the arrears, at a subsequent day. In this respect, the present case resembles that of *Webster* v. *Bannister (a)*, where your Lordship said, that you should have held the act of payment at a future day, to be in itself proof of

(a) E. 20 Geo. 3. *supra*, p. 393.

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of a waver, of the forfeiture of an annuity bond. The penalty was not a subsisting debt after the waver. It could not, therefore, be proved under the commission, nor discharged by the certificate, for no debt can be proved that is not *demandable* at the time of the bankruptcy. Indeed, by the statute of 4 & 5 *Ann. c.* 16. § 12. payment of money secured by a penalty in a bond, *after* the day in the condition of the bond, amounts to a parliamentary waver of the forfeiture incurred by the non-payment on that day. It is true, the words of the statute specify only bonds conditioned for the payment of *a lesser sum, at a day or place certain,* and mention the payment *of the principal and interest* due. But it cannot have been intended to confine the provision to conditions for the payment of one lesser sum, and to exclude bonds for securing repeated lesser sums to be paid successively, or such upon which no interest is to be paid. But, besides the penalty in this bond, there is, in the condition, an agreement, or covenant, under the seal of the defendant, for the payment of the annuity. Upon this, an action of debt, or covenant, might be maintained, exclusive of the remedy on the penalty; and it has been frequently decided, and particularly in a late case of *Cotterell* v. *Hooke (b)*, that the remedy for the growing payments of an annuity, when secured by covenant, are not barred by a bankruptcy and certificate. By the statute of 8 & 9 *Will.* 3. *c.* 11. § 8. in actions upon bonds for non-performance of any covenants, or agreements, in any indenture, deed, or writing, contained, the plaintiff is to recover, not the penalty, but damages for every breach he shall prove. This bond is of that sort, and, since that statute, a breach of the covenant and agreement does not entitle the plaintiff to the *penalty*, even at law, but only to have it stand as a security for future breaches.

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Dunning,—The inclination, both of courts of law and equity, has always been, to give to bankrupts who have acted fairly, a complete discharge. It is impossible to imagine a case more proper to shew the hardship of the doctrine contended for on the other side, than the present; for the defendant was made a bankrupt only on the 24th of *March*, and on the 25th, the very day after he became liable, (if the plaintiff's action should be sustained,) to a quarter's payment of this annuity. In *Webster* v. *Bannister*, issue was taken on the fact of payment after the day, and therefore the question, how far such payment would have been a waver of the forfeiture, was not before the court. Your Lordship might use some expression, similar to what has just been stated, in that case of *Webster* v. *Bannister*; but you certainly did not mean to give a solemn opinion upon the point. Had the case required it, you would have given the question a more thorough consideration. The idea of waver originated from the statute of

(b) H. 19 Geo. 3. *supra*, p. 97.

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of queen *Anne*, but that statute has never been understood to relate to bonds for securing annuities. The first case in Chancery, on this subject, was in 1738, *Ex parte Le Compte*(b). The next in 1741, *Ex parte Belton* (c). In both these, the annuitant was let in to prove the value of his annuity, on the ground that the bond being forfeited by non-payment on the day, the penalty had become a debt at law. There was, however, no question about any waver by a subsequent payment in those cases. But, in the case of *Perkins* v. *Kempland* [1], which was decided a few years ago in the court of

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Common Pleas, it was unanimously held, that a payment *after* the day would not discharge the forfeiture of an annuity bond, which, when once it has become absolute, can never be made conditional; that such bonds are not within the statute of queen *Anne*; that, if a forfeiture has happened before a bankruptcy, the annuity may be valued, and proved under the commission; and that, after the certificate, the bankrupt is not liable to any future payments. This case is decisive.

Wood, in reply,—In *Cotterell* v. *Hooke*, which was subsequent to *Webster* v. *Bannister*, the case of *Perkins* v. *Kempland* was cited: that case was simply a bond containing a penalty for securing the annuity: there was no agreement contained in the condition.

BULLER, *Justice*,—The cases of *Webster* v. *Bannister*, and *Perkins* v. *Kempland*, may stand very well together. As to the case of *Cotterell* v. *Hooke*, that was an action upon the deed of covenant. Here, if you had an election, and could have proceeded upon the agreement, you have made your election, and taken the other course, for this is an action for the penalty.

The court took time to consider; and, this day, Lord MANSFIELD delivered their unanimous opinion, as follows:

Lord MANSFIELD, (after stating the pleadings and the case,)—Before, and at the time of, the bankruptcy, no money was due under the condition of the bond. The penalty had been incurred, a quarter's annuity not being paid on the day, but the obligee had afterwards received the money. The question is, whether there was any debt due at the time of the bankruptcy; and, as between the parties, on general principles, when a forfeiture lies in compensation, and the person entitled to the compensation receives satisfaction after the forfeiture, he can never resort back to the penalty. Take the common case of rent: if payment is made after the day, you can never recur to the forfeiture. All forfeitures are odious, if carried beyond their true intent. Besides, (I here speak my own

(b) 1 *Atk*. 251.

(c) *Ibid*.

[1] *T*. 16 *Geo*. 3. Since reported, 2 *Blackst*. 1106. Mr. *Dunning* read a much fuller note of the case than what is there given.

own opinion,) in questions between the parties, I should exceedingly incline to say, that annuity bonds are within the reason, though not the letter, of the act of the 4th and 5th of queen *Anne*; an act made to remove the absurdity which Sir *Thomas More* unsuccessfully attempted to persuade the judges to remedy in the reign of *Henry* VIII. For he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction. This is a remedial law, and, if a case is within the mischief, the remedy ought to extend to it. I should have thought, therefore, that payment *after* the day might be pleaded to an action on an annuity bond. In the case of *Webster* v. *Bannister*, as far as it was necessary to consider the point, we were all inclined to think, that, even without an express agreement to give farther time, the receipt of the money after the day would have been sufficient. But insolvent acts differ from the bankrupt laws; there is no authority, no commissioners, under the insolvent acts, to set a value upon the annuity. The present case arises on a bankruptcy. It is to be lamented that so large a class of creditors as annuitants are, should be left without any express provision in the bankrupt laws. It is hard upon them that they should be excluded from proving under the commission, (when, perhaps, the other creditors may receive 15 shillings in the pound under it,) and should be left only to a fruitless remedy against the bankrupt. It is also hard upon an honest bankrupt, who has given up his all to his creditors, that he should still continue answerable for debts which he has nothing to satisfy. This is a great defect and chasm. It is a pity that the legislature should be silent, and should force the courts, in order to attain the ends of justice, to invent legal subtleties, which do not come up to the common understanding of mankind. *That* has been done in the case of annuities. The court of Chancery has laid hold of this subtlety. It has said,— The penalty is the debt if the forfeiture has been once incurred, and you may have a value set upon your annuity, and come in as a creditor, under the commission.—If it is objected, that the forfeiture was waved, the court answers,— No matter for that; it shall be still in force, because it is for the benefit both of the creditor and the bankrupt that it should be so.—This has been settled, and we all adhere to the determination, as far as this case goes, as a legal subtlety, established for good purposes, but not to be drawn into principle or argument in other cases. It has been the foundation of practice in the court of Chancery, and has received a solemn consideration in the court of Common Pleas, in the case of *Perkins* v. *Kempland*, which is an authority directly in point.

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point. That court thought annuity bonds were not within the statute of queen *Anne*, and, for that part of their opinion, relied on what Lord HARDWICKE said, in a case *Ex parte Winchester (a)*, *viz.* that the words, "*at a day or place certain*," are *material* words in the statute, and that bonds, not given for the payment of a lesser sum at a day or place certain, are not within it. I hardly think he would have considered those words as sufficient to take a case out of the statute, which is clearly within the reason and meaning of it, if it had not been to give the party the advantage of the equitable subtlety, by which he was enabled to prove under the commission. We consider ourselves as bound by the authorities, as far as the present case goes; but no further.

The *postea* to be delivered to the defendant.

(a) In *Canc.* 1744. 1 *Atk.* 118.

Friday, 24th Nov.

The KING, on the Prosecution of PARBURY and Another, Executors of DAWES, *against* the Governor and Company of the BANK of ENGLAND.

The court will not grant a *mandamus* to the Bank to transfer stock, because there is a remedy by an action on the case, if they refuse — *Qu.* Whether executors, who take no beneficial interest, and have no debts to pay, are intitled to have the stock of their testator, transferred to their name.

THIS was an application for a *mandamus* to be directed to the defendants, commanding them to permit the prosecutors to transfer £1000 *Bank* stock, as having been the property of their testator. One *Lascelles*, being possessed of £12,000 *Bank* stock, which stood in his name, by his will appointed *Dawes* his executor, and gave him, as a legacy, £1000, part of the £12,000. *Dawes*, who proved the will of *Lascelles*, but never transferred the stock to his own name, by his own will, of which he appointed the prosecutors executors, bequeathed to his kinswoman "*Lydia Fennymore*, if "living at the time of my decease, the sum of £1000, of the "capital stock of the *Bank* of *England*, and, although I "have not transferred Mr. *Lascelles*'s stock into my name as "yet, the property is wholly and solely in me, as may be seen "by his will." Upon *Dawes*'s death, the prosecutors proved his will, and applied to the *Bank* for leave to transfer the £1000, which was refused, unless they should produce a certificate of the death of *Lydia Fennymore* [1]. Upon this they applied to the *Foundling Hospital*, where it seems she had been

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[1] It appeared, that it is the practice of the *Bank*, and the other great companies, never to permit the transfer of stock without the production either of a probate of the will of the person last intitled, or a certificate of the actual death of such person.

been placed by *Dawes*, (whose natural daughter the prosecutors swore they believed she was,) and where they found, by the books, and registers, strong evidence of her death, and that she died before the testator; and, they were, at first, promised the certificate required, but the governors of the *Hospital* afterwards refused to grant it, and the prosecutors applied again to the *Bank*, stating the evidence of the death of the legatee, and that the certificate had been refused. Upon this second application, they were told the certificate could not be dispensed with. This court was therefore moved, upon *affidavits* stating the above circumstances, and a rule to shew cause was granted, but with directions that notice of the rule should be given to the *Foundling Hospital*.—It appeared, upon inspecting the will of *Dawes*, that particular legacies were given by it to the prosecutors.

This day, cause was shewn, by the *Attorney-General*, and *Jackson*, on the part of the *Bank*; and *Bearcroft*, on the part of the *Foundling Hospital*.

On the part of the *Bank*, it was urged, that they had no satisfactory evidence of the death of *Lydia Fennymore*, and that it had been the rule and practice with them to transfer stock to legatees directly, without the interposition of the executors: that this was founded on the construction which had been put on the statute of 5 *Will.* & *Mar.* c. 20. by which the *Bank* was established, and of the different charters they had received from the crown, under the authority of that statute; that all the acts, relative to stock, use the word "*devise*," and therefore the opinion had been adopted, that the legislature intended, that, in respect to the manner of transmission by will, stock should pass immediately as *real property*, (to which the word "*devise*" is peculiarly appropriated,) does; *That* was the opinion of Serjeant *Pengelly*, who had been counsel for the *Bank*, and upon whose advice they had pursued the practice just stated.—They said, however, that the *Bank* was extremely ready to act in any manner the court should direct.

For the *Foundling Hospital*, it was said, that,—as the legacy to *Lydia Fennymore* was lapsed, and there was reason to believe the testator was a bastard, (which however was not sworn to,) or at least, that no next of kin could be found, and as the executors, having legacies, could take no beneficial interest, and it was not pretended there would be any debts to be paid,—they were advised that the money belonged to the crown; that, upon this, they had applied to the *Treasury* for a grant of it, for the benefit of the *Hospital*, which application they had reason to think would be successful; that, under these circumstances, they had not chosen to facilitate the transfer of the stock, thinking it safest in the hands, and under the protection, of the *Bank*.

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 Dunning,

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The King against The Bank of England.

Dunning, on the part of the prosecutors, contended, that the *legal* title was clearly in them, and that the court would not enquire to whom *they* were accountable for the *equitable* interest; that the use of the words "*devise*" or "*devisee*," in acts or charters hastily and ignorantly penned, could not alter the nature or incidents of a species of property clearly personal; that this application was not to the *favour* or equity of the court; but was founded on *right*, in order to compel the defendants to do their duty.

Lord Mansfield,—When there is no specific remedy, the court will grant a *mandamus* that justice may be done. But where (as in this case) an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus*[☞]. I do not think this a clear case. It appears, on the face of the will, that the executors have no beneficial interest. If the testator was a bastard, the king is the next of kin[† 111]. Here, neither any person claiming as next of kin, nor the crown, are before the court. Notice has been given to the *Bank* not to permit the transfer. The *Bank* is therefore in the nature of a stakeholder only. The real question is between the crown, (or the *Foundling Hospital* as standing in the place of the crown,) and the executors of *Dawes*, the prosecutors of this rule.

The rule discharged [1].

[☞] *Vide acc. Rex* v. *Bishop of Chester*, *B. R. M.* 27 *Geo.* 3. 1 *Term Rep.* 396.

[† 111] *Vide Burgess* v. *Wheate*, *Canc.* 1759. 1 *Blackst.* 123.

[1] A special action of *assumpsit* was afterwards brought by the executors, against the Governor and Company of the *Bank*, which was tried before Lord Mansfield, at *Guildhall*, at the Sittings after *Hilary Term*, 21 *Geo.* 3. Upon the trial, it was admitted that *Lydia Fennymore* died in the *Foundling Hospital*, in the testator's [527] life-time; and it was proved that *Dawes* was reputed to be a natural son of *Lascelles*, and that he had no next of kin. It also appeared, that the *Foundling Hospital* had succeeded in obtaining a grant from the crown of the stock in question. A verdict was found for the plaintiffs, but with leave to move the court, that a nonsuit, or verdict for the defendants, might be entered. Accordingly, in *Easter Term*, 21 *Geo.* 3. the *Attorney-General* obtained a rule for that purpose. It seems it is customary for the crown to grant to the *Hospital*, such property as would have belonged to foundlings who happen to die there. The grant, in this case, was in the form of a warrant, under the sign manual, authorizing *George Whalley*, esq. of the *Foundling Hospital*, to call upon the plaintiffs, as executors, for a transfer of £1000, and for an account and payment of the residue of the personal estate and effects of *Dawes*, and to receive the same *for his Majesty's use*, (*vide Megit* v. *Johnson*, *infra*, 542.) In consequence of this authority, *Whalley*, before the trial, had filed a bill in Chancery, praying an account against the plaintiffs, and an injunction to be directed to the *Bank*, to restrain them from transferring the stock to the plaintiffs. Pending the rule for setting aside the verdict, a compromise took place, so that it was never argued.

SYERS and Others *against* BRIDGE.

Friday, 24th Nov.

A liberty "*to cruise six weeks*," in a policy of insurance, means "six weeks *successively*, from the commencement of the cruise."

ACTION against an underwriter, on a policy of insurance on the ship *Mary*, a letter of *marque*. The words of the policy were, "At and from *Liverpool* to *Antigua*, *with "liberty to cruize six weeks*, and to return to *Ireland*, or "*Falmouth*, or *Milford*, with any prize or prizes." The ship having been taken, this action was brought, and came on to be tried, at the last assizes for the county of *Lancaster*, before HOTHAM, *Baron*, when a verdict was found for the plaintiffs, but with liberty to the defendant to move for a new trial, without payment of costs.

On *Thursday*, the 9th of *November*, *Macdonald* obtained a rule to shew cause, why there should not be a new trial; and, to day, the case was argued, by the *Attorney-General*, *Dunning*, and *Davenport*, for the plaintiffs, and *Macdonald*, *Lee*, and *J. P. Heywood*, for the defendant.

Upon the judge's report, the evidence given at the trial appeared to be as follows: The policy was made on the 9th of *February*, 1779, and there was no time fixed in it for the commencement, or the duration, of the voyage. The captain, being called on the part of the plaintiffs, swore that he, in fact, sailed from *Liverpool* on the 28th of *February*; he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chacing, however, at different times, from the 7th to the 14th, when he began his cruise, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. [528] From the 14th of *March*, he continued cruising about the same latitude (43), till the 17th or 18th of *April*, when he discontinued the cruise, of which he also gave notice, intending to go to the *Burlings*, off *Lisbon*, in the course of his voyage. On the 23d, he renewed the cruise, of which he gave notice, as before, and ordered a minute, to that purpose, to be entered in the log-book. From that time he continued cruising till the 28th of *April*, when he was taken by an *American* privateer. Two or three days before he sailed, he met with *Kenyon*, the broker, who had got the policy subscribed, in the counting-house of the plaintiffs, who, in discoursing about his liberty to cruise, said he might do so in any latitude he chose, and that if he had no success in one place, he might leave it, and proceed to another, and there begin cruising again, mentioning when he should begin, and leave off, in his log-book; and that if such separate times of cruising should not, when added together, exceed the space of six weeks, the

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terms of the insurance would be complied with. None of the under-writers were present at this conversation; but the captain said, he considered *Kenyon* as acting for them, as well as for the insured. His log-book was taken, but he produced a journal, which he and his clerk had copied from the log-book. He said, he understood the meaning of "*cruising*" to be, delaying the course of the voyage, in any particular latitude. The second witness produced by the plaintiffs had been captain of a letter of *marque* in the last war. He defined "*cruising*," a delay of the voyage, under a fair wind to the port of destination. He had examined the journal, and was of opinion, that there had been no delay in the voyage, except at the times which the captain had expressly appropriated to the cruise: It is the custom for letters of *marque* which have not liberty to cruise, to chace, when they fall in with an enemy's ship: He was never cautioned against it, and had chaced frequently under such circumstances. In like manner, without such liberty to cruise, it is customary, and permitted, to letters of *marque*, to go three or four points out of the direct course, for the purpose of speaking ships, and he did not consider any of the acts done by the captain, before the 14th of *March*, as cruising.—The defendant's counsel read several entries from the journal, to shew different instances of chacing, and quitting the direct course to speak ships, between the 7th and 14th of *March*. They then [529] called a witness, who had also commanded a letter of *marque*, during the last war, and who swore, that he thought the ship, by what appeared from those entries, was to be considered as cruising between the 7th and 14th The counsel for the defendant called several other persons; two of whom were brokers. His witnesses concurred in thinking, that, by the terms of the policy, the cruise must go on six successive weeks, not interruptedly, and at intervals.—The two witnesses examined on the other side thought, on the contrary, that the policy did not import any such restriction; but they admitted, on the one side and the other, that they only spoke their opinion, and could say nothing of any usage, none of them having ever known a case circumstanced like the present.

The defendant, upon the above evidence, set up a two-fold defence: 1. If the cruise was to be considered, as having been continued from the 7th, instead of from the 14th, of *March*, to the 17th or 18th of *April*, then the ship had cruised above six weeks, at different intervals, and, consequently, the terms of the policy had been departed from: But, 2. If the jury should not be of that opinion, still, from the words of the policy, as well as the nature of the thing, the six weeks were meant to be successive, and uninterrupted, and therefore expired at the end of six weeks computed from the 14th of *March*.

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The judge declined giving any direction, or opinion on this last point, it being agreed that the opinion of the court should be taken upon it.

1. In support of the verdict, it was, now, contended, on the first point, that it was a question of fact, proper for the decision of the jury, when the cruise began. The captain had positively sworn that it did not commence till the 14th, and the jury had believed him. As to chacing an enemy's vessel which appears in view, or going a little out of the course to speak to a ship, *that* is never considered as a deviation, in the case of a letter of *marque*. It is what they always do, and, it being known to the under-writers that this was a letter of *marque*, no express licence, or stipulation, was necessary, to protect her in that respect. But, if a letter of *marque* quit the direct course of the voyage on purpose to look for prizes, *that* is a deviation, unless she is protected under a particular licence; for the difference, and the only difference, between a letter of *marque* and a *privateer*, is, that the sole object of the latter is cruising, the principal object of the former a trading voyage. 2. The natural construction of the licence in the policy is, that six weeks, no matter how made up, may be employed in cruising. Suppose, on the second day of the cruise, a prize had been taken, and carried back to *Milford*, *Falmouth*, or *Ireland*; can it be contended, that the time employed in bringing the prize into port, must have been computed as part of the six weeks? The broker's construction ought to bind both parties; he is a sort of a middle man, equally the agent of the insurers and insured. Besides, in this case, *Kenyon* was actually in partnership with one *Slater*, as a broker, and this very *Slater* was an under-writer on the policy.

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On the other side, the counsel contended, that a great deal of inadmissible evidence had been received. That the question, whether the six weeks were to be successive, was a mere point of construction on the words of the policy, and the opinion of *Kenyon*, or the witnesses, ought not to have been given in evidence. If, indeed, there had been proof of any general usage, *that* would have been admissible, but nothing of that sort was attempted. If the plaintiffs construction were to prevail, a captain might watch occasions when the wind was directly in his teeth, and then declare that he stopped cruising, and was to be considered as pursuing his voyage.—They said nothing on the first point.

Lord MANSFIELD,—This was merely a question of construction [F 1], on the face of the policy, and, unless, an usage

[F 1] In *Lawrence* v. *Sydebotham*, 6 *East*. 51, it was held, in a policy on a ship with or without letters of *marque*, that liberty "to chace, capture,

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usage could have been shewn in favour of this desultory cruising [r 2], calling witnesses to support it, was calling them to swear to mere opinion. None of those produced knew of any instance, and, therefore, their evidence ought not to have been received. Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends on the subject. The instructions were not read, but they shew the meaning very clearly, for they run thus, "To cruise six "weeks, and *then* proceed to *Antigua* [1]." There can be no general rule. Here, the subject-matter, in my opinion, is decisive to shew that the six weeks meant one continued period of time. A cruise is a well known expression for a connected portion of time. There are frequently articles for a month's cruise, a six weeks cruise, *&c.* Such a liberty as in this case, to a letter of *marque*, is an excuse for a deviation. But what is contended for by the plaintiffs is impossible in [531] practice. Suppose the ship returns *directly back*, cruising for the space of a week: she may then take perhaps three weeks to return to where she had been. Can she then renew the cruise, and return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, "I will excuse a deviation for six "weeks." The instructions, although it happens that they were not read, strike me much. Another argument: Six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said 42 days.

The rule made absolute.

[1] They were in court, and had been stated by the counsel for the defendant.

"ture, and man prizes," did not extend to justify shortening sail for the purpose of protecting and conveying a prize into a port, although within the voyage insured.

[r 2] But where there has been no judicial determination upon the construction of the terms of a licence in a policy, (there, simply, *with or without letters of marque*) it is right to resort to evidence of the usage and practice which has obtained between assured and assurers upon similar policies. *Parr v. Anderson*, 6 *East.* 202.

The KING *against* ROUTLEDGE.

Friday, 24th Nov.

A college barber at *Oxford*, though he resides in the city out of college, is intitled to the privileges of the university.—2*u*. Whether, under that right, he is exempt from serving the office of constable for the city.

AN indictment having been found against the defendant, at the quarter-sessions for the city of *Oxford*, for refusing to take upon himself the office of constable for one of the wards in that city, it was removed, by *certiorari*, into this court, and came on, for trial, before BULLER, *Justice*, at the last summer assizes for the county of *Oxford*, on *Friday*, the 28th of *July*, 1780.

The indictment contained two counts. The *first* stated, *generally*, that the defendant being an inhabitant, and residing in the ward in question, was on, &c. *lawfully and in due manner elected, nominated, and appointed* by *J. T.* alderman of that ward, and one of the justices for the city, into the office of constable for the said ward; that he afterwards had notice of the appointment, and was summoned to appear before *K. J.* and *E. T.* two other justices of the city, to be sworn in. The *second* count alleged, *particularly*, that *Oxford* is an ancient city, that, from time immemorial, there had been accustomed to be four aldermen of the said city, and that each of such aldermen should and might, on the 30th of *September*, every year, (or the day following, if the 30th of *September* should be a *Sunday*,) elect and choose, and of right ought to elect and choose, a fit and able person, &c. to be constable, in and for the ward to which such alderman should respectively belong; that the said defendant was an inhabitant, &c. and a fit and able person, and that the said *J. T.* then was one of the aldermen of the said city, to wit, for the ward in question, and that on the said 30th day of *September*, in the year, &c. the said *J. T.* did duly and lawfully elect, choose, and appoint the defendant, &c. (Then stating the notice and summons, as in the former count, and concluding that notwithstanding the election and appointment the defendant refused to take the oath, &c.)

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The defence consisted, 1. In putting the prosecutors on proving the custom as laid in the second count of the indictment: 2. In shewing that the defendant, being matriculated in the university, and entered on the buttery-books of *Brazen Nose College*, as barber to the college, was not liable to serve as constable, although he resided, and kept a barber's and perfumer's shop in one of the wards of the city.

The evidence for the prosecution, with regard to the custom, was, that, on the 30th of *September*, (or the 1st of *October*,) annually, a meeting is held, in the town-hall, of the *mayor*, four aldermen, and *assistants*, at which the new mayor is

sworn

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sworn in, and the city officers, *viz.* constables, &c. appointed; that, on such occasions, the hall is open to every body; that constables are never appointed but at that meeting; but that none of the members of the corporation ever interfere in their appointment except the aldermen, each of whom appoints one for his own ward; that this is done in the following manner: the old constable delivers in a list of all the persons in his ward fit to serve the office, and the alderman of the ward names one from that list.

With regard to the liability of the defendant to serve, the prosecutors, after proof of the defendant's residence in the ward, and his keeping a shop there for perfumery, toys, &c. endeavoured to shew, that, in many instances, persons of a like description, *viz.* barbers, cooks, &c. of different colleges, had served the office. They had given notice to the defendant to produce the matriculation-books of the university, in order to prove the matriculation of those persons; but, as the books had not been inspected before, and there was no index, they were not able to find the names of any of them. It was admitted, on the part of the defendant, that the *Vice-Chancellor* of the university often directs his warrants to be executed by the *city constables*.

The defendant's counsel, on the question concerning the custom, read a clause in the charter of 3 *Jac.* 1. to the city of *Oxford*, by which it is provided, that constables, &c. of that city, in case of vacancies, shall be chosen by the mayor, &c. and *commonalty, or the major part of them; "de civibus civitatis prædictæ."* They also read the constable's oath, by which he is bound to attend the city court, &c.

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On the other head, they proved the defendant's matriculation in the university books; that he was barber of *Brazen Nose College*; and that an antient fee is annexed to that office, which was regularly paid to him; that the office of barber is taken notice of in the statutes of the college; and that the defendant, if the members of the college chose, was bound to act as their barber, and, on one or two particular occasions in the year, to attend at the college as a servant; that he actually had regularly attended on those occasions, but was not then employed in the exercise of his trade as a barber. They then read a passage from a charter of *Edw.* 4. reciting a composition made between the university and the city in the reign of *Edw.* 1. as follows;

"Ad hoc etiam, quod prædicti major & burgenses queruntur, quod, cum per cartam domini regis non cedantur aliquæ libertates aliis in prædictâ villâ, quam scholaribus universitatis prædictæ, et illi scholares sint exempti a communitate prædictâ ad respondendum coram eis, vel simul cum ipsis, de aliquibus rebus ipsum dominum regem vel

"communitatem

"communitatem prædictum tangentibus, prædicti cancellarius "& scholares, per procuratores suos, alios sibi appropriant, "et qui non sunt scholares, ut cissores, *barbatores*, scrip-"tores, parcaminarios, & hujusmodi, qui non sunt de juris-"dictione suâ, & qui habent, in eâdem villâ, uxores, fami-"liam, & mercandisas suas, & hoc ad grave damnum domini "regis, & firmariorum suorum—Ad quod, per prædictum can-"cellarium & magistros, ac etiam per prædictos majorem & bur-"genses, unanimiter est concordatum, quod, de cætero, nullus "gaudeat *libertatibus seu privilegiis universatatis prædictæ* "nisi clerici et eorum familiæ et servientes, parcaminarii, "*luminarii* (a), scriptores, *barbatores*, & alij homines de "officio, qui sunt de robis ipsorum clericorum."

They also produced an indenture, or sort of agreement, between the university and the city, in the 37th year of *Hen.* 6. 1459, by which agreement the city admitted, that the magistrates of the university were joint conservators of the peace, and the particular persons intitled to *the privileges of the university* were enumerated, and, among them, *barbers with their household*. There was, however, no evidence given to shew the extent of those privileges, or whether the exemption from serving the office of constable was included in that general expression. It appeared that the present corporate name was the same as in the charter of 3 *Jac.* 1. In a modern corporation book, beginning in the year 1776, the title of the entry of the meeting of the 30th of *September*, was—"*For the election of officers,*"—and nothing was stated in the book of any other business being done at such meeting. It mentioned nothing of the mode of electing the constables; the entry of the election of each being simply, —"*A. B.* was chosen constable for the ward of *C.* and "sworn in."

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After the evidence was closed, it was contended, at the trial, on the part of the defendant;—1. That the prosecutors had not proved the custom as laid. The presence of the mayor and assistants appeared to be necessary at the meeting, and it also appeared to be part of the usage that each constable should be named out of a list delivered in by his predecessor. But neither of those circumstances were laid as a part of the custom, in the *second* count of the indictment. The usage, as proved, seemed, it was said, to shew, that the election was made according to the charter of 3 *Jac.* 1. not by any prescriptive right, for that, although the nomination for each ward was, *de facto*, left to the alderman of that ward, yet the meeting was open to the whole corporate body. (The counsel for the prosecution seemed, at the trial, to admit that the *first* count was too general, and could not be supported.)

(a) *i. e.* Illuminators of manuscripts. Hence probably the word "*Limner.*"

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supported.)—2. It was insisted by the defendant's counsel, that, supposing the custom had been proved to exist as laid in the indictment, and that the appointment had been agreeable to the custom, still the defendant must be acquitted, because he was clearly intitled to *the privileges of the university*, and, as no instance had been shewn of a *matriculated* barber having served as constable for the city, the exemption from that office ought to be considered as one of those privileges.

To these objections, it was answered;—1. That, as to the charter of 3 *Jac.* 1. it was out of the question, for that *Oxford* is a city by prescription, and it did not appear that the city had ever accepted that part of the charter relied on by the defendant. With regard to the variance between the evidence and the custom as laid, it was not material; it had not been said, by any of the witnesses, that the meeting was *necessary* to the appointment of constables; it was only proved that, in fact, they had been appointed at that meeting; but *that* was merely matter of convenience, because the aldermen must meet in the hall that day, in order to swear in the mayor.—2. The exemption claimed could not be supported on the indefinite and general expressions in the ancient instruments which had been read, especially as the defendant was merely a colourable servant of a college and others, who, *de facto*, stood in similar predicaments had been proved to have served the office.

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BULLER, *Justice*, in summing up to the jury, said, there were two distinct questions in the case, perfectly independent of one another, and he would take their opinion separately on the first, because, if that opinion should be one way, it would become unnecessary for them to consider the other question. He then said, that, if the practice was at all reconcileable to the charter, *that* must be taken as the authority and rule for the appointment of the constables; and that it seemed to him, that the *nomination* by the aldermen might be consistent with an *election* by the mayor, &c. and commonalty. It was not denied that *part* of the charter had been accepted; the present corporate name was that given by the charter; and he was inclined to think, that a charter must be accepted in *toto*, if at all[1]. There was no *list* mentioned in the indictment, yet *that* was proved to be an invariable part of the usage. The entries in the book, relative to the meeting, seemed to shew, that the chief, if not the only, purpose,

[1] *Vide Rex* v. *Cambridge*, *E.* 5 *Geo.* 3. 3 *Burr.* 1656. 1661. 1663, where it is held, that a *new* corporation must accept a charter *in toto*, or not at all; but that one *already existing* may accept one *in part*. ☞ For the doctrine concerning the acceptance of charters, *vide Rex* v. *Amery*, *H.* 27 *Geo.* 3. 1 *Term Rep.* 575 to 590 & *S. C.* on a writ of error in *Dom. Proc.* 30 *Geo.* 3.

pose, was the election of officers. Upon the whole, he inclined strongly for the defendant, on this head.

The jury, however, which was special, but consisted chiefly of *tales* men, found this question for the prosecutors.

The judge afterwards stated, and observed upon, the evidence on the head of the exemption; and seemed to think, that it was to be presumed that this was comprehended in the general word "*privileges*," unless the contrary had been shown.

The jury, however, found this question also for the prosecutors; and there was a general verdict against the defendant.

On *Thursday*, the 9th of *November*, *Bearcroft* obtained a rule to shew cause, why a new trial should not be granted, and, this day, the case was argued, by the *Attorney-General*, *Howorth*, *Dunning*, and *W. Jones* for the prosecution, and *Bearcroft*, and *Th. M*[illegible], for the defendant.

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In support of the verdict it was contended: 1. That, supposing there was a material variance between the evidence and the *second* count, yet the *first* count was sufficiently particular, and might well be supported: 2. That the variance between the evidence and the second count was not material; there was no proof that the presence of the mayor and commonalty was a *necessary* part of the custom, nor that the aldermen might not nominate persons not contained in the old constable's list; and, upon the whole, the evidence on this head was sufficient to be left to a jury: 3. That it was too violent a presumption to imply, that, under the general expression of "*privileges* "*of the university*," this exemption was included. In every case of parish-offices, which are of general utility, all inhabitants householders are liable to serve, unless there is an *express exemption*. There might be some reason for such a claim, by those servants of colleges who are bound to constant attendance, but this man was little more than a nominal servant, and belonged much more to the city than to the university. However, the office of constable is of such a nature as to be equally beneficial to the university as to the city, and, therefore, there is no very good reason why any member of either body should be exempt from serving. It was, moreover, proved at the trial, that several college barbers had served the office: it is notorious, that *all* college servants are matriculated; therefore, though the entries of the matriculation of those men had not been found, the jury might fairly presume, that they had been matriculated. If they were, those instances completely overturn the pretended right of exemption.

For the defendant, it was insisted,—1. That the *first* count, most clearly, could not be supported. Constables, by the common law, are appointable only at the court leet, or, in default of appointment there, by the conservators of the peace,

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or at the quarter sessions. A corporation, as such, has no right to appoint constables. They must intitle themselves to it, under some particular prescription, or grant. Hence, in indictments of this sort, it is held indispensably necessary that such grant, or prescription, should be alledged, and plainly set forth; 2 *Hawk. Pl. Cr.* c. 10. § 46. *Rex* v. *Vaws* (a), *Rex* v. *Barnard* (b).—2. As to the variance between the evidence and the custom laid in the *second* count, it is material and fatal. By the custom *proved*, the persons eligible are limited to the constable's list; by the custom *laid*, there is no such restriction. According to *the evidence*, the appointment must be in a corporate meeting; according to *the indictment*, no such meeting is requisite.—3. As to the exemption, there is no distinction to be made between the defendant's case, and that of the highest members of the university; he is intitled, like them, to the *privileges* of the university, and therefore the question on this head comes to be, Whether every member of the university is liable to serve this office? The counsel for the prosecution feel the absurd extent of the proposition when stated in this manner, and, therefore, would distinguish the defendant from other members of colleges by the circumstance of his non-residence; but it is a notorious fact, that none of the servants of colleges reside within the college, except the porter. Are no servants, but the porters, intitled to the university privileges? Every college is situated locally in some of the wards of the city, and, therefore, every inhabitant of a college is also an inhabitant of the city, so that the exemptions which members of colleges enjoy must be personal privileges, not at all depending on their not inhabiting in the city. The privileges, by the agreement in the reign of *Hen.* 6. extend to barbers *with their household*. This expression goes very strongly to shew that persons of the defendant's description are intitled; for barbers with their *household* cannot be supposed to have lived within the walls of a college. The following reasons evince that the exemption claimed by the defendant is among the privileges common to all members of the university. 1. That the university has a court-leet is well known, and appears by the case of *Rush* v. *The Chancellor and Scholars of Oxford*, in *Salkeld* (c), as well as by the statute of 13 *El.* c. 29. which ratifies, to both universities, "all liberties, &c. letes, law-days, &c." Now the appointment of constables is incident to every court-leet. 2. The magistrates of the university are conservators of the peace, and to such the office of constable is necessary and subservient. 3. Every matriculated person is one of the homage of the university court-leet, and liable to be appointed a constable

(a) B. R. M. 21 Car. 2. 1 Mod. 24.
(b) B. R. H. 9 Will 3. Comb. 416.
(c) B. R. T. 1 Ann. 1 Salk 347

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stable there, and it is said by *Hawkins* that no man can be of two leets *(b)*. Much less can the same person act, at the same time, as the officer of two different jurisdictions. Yet, if this exemption does not exist, a member of the university may be appointed a constable both by the city and the university. Many instances might be cited in which the court has expressly held persons to be exempt from serving this office, because it was incompatible with their other duties: as *attorneys*; because they are attendant on the courts of justice; *Prouse's* case *(c)*: and *aldermen* of *London*; because they ought to be resident in that city, and are fineable if absent; *Abdy's* case *(d)*.

Lord MANSFIELD,—I am well persuaded the reason which induced the counsel for the city to wave the *general* count, at the trial, was, that they knew it could not be supported. With regard to the custom laid in the *second* count, the circumstance of the list is an essential variance. The alderman cannot appoint, *ad libitum*, any one of his ward: he is confined to the return made by the former constable. As to the exemption, the university has a separate jurisdiction, established by ancient wisdom, and it is essential to its happiness and peace that this should continue. The body of the university has always been kept distinct from the city at large; and I believe every university in the world is so constituted. Who is it, in this case, that claims the exemption? A servant of the college, named in the statutes, with an ancient fee, and duties which require attendance and service in the college. All colleges have servants of this sort. For many years, I had the honour of being counsel to one of the colleges, and had an ancient fee annexed to my office. It seems admitted, that, if the defendant resided within the walls of the college, he would be exempt. But it is certainly true, that none of the servants but the porter do live within the walls. Besides, the agreement with the city, which declares that the privileges extend to barbers *with their household*, overturns such a distinction. In short, the defendant seems to be a fully privileged person. I think the verdict, on both points, contrary to evidence.

The rule made absolute [1].

(b) 2 *Hawk.* c. 10. § 12. 589.

(c) *B. R. M.* 10 *Car.* 1. *Cro. Car.* 89.

(d) *B. R. T.* 16 *Car.* 1. *Cro. Car.* 589.

[1] There has not yet been any new trial had, (Vacation after *T.* 22 *Geo* 3.)

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Saturday, 25th Nov.

ABERNETHY *against* LANDALE.

An officer or sailor who has engaged to serve on board a letter of *marque*, for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she compleats her voyage, although he shall have been sent from the ship before the capture, as prize-master on board a prize taken in the course of the voyage.

THIS action was tried before BULLER, *Justice*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court, on a case which, (as far as is material,) stated:—That the defendant was captain of a ship called the *Winchcombe*, which was provided with *letters of marque*, and was to cruize *for three months*[2], and then proceed to the coast of *Africa*, and from thence to *America*: that the plaintiff, in consideration of £5 by the month as wages, and of certain shares of all prizes which should be taken by the *Winchcombe* in the course of the cruize,—entered on board the ship, as second lieutenant, and subscribed certain articles, by which, among other things, it was agreed between the defendant as captain, and the plaintiff, together with several other persons, as the officers and crew of the ship; that the plaintiff, as second lieutenant, and the said crew, should repair on board, and proceed in the ship, and duly serve, in their several capacities and stations, in her then intended voyage from *London* to the coast of *Africa*, and to and from thence to such place or places in *America* as the said master, or other master or masters for the time being, should direct, and from thence back to the port of *London*, or some other her discharging port in *Great Britain*; and that the wages or monthly pay to grow due to the said officers, sailors, and others, belonging to the said vessel, for their service on board thereof that present voyage, should be paid to, and accepted by them, in the manner following, *viz.* one half part thereof at the port or places of the delivery of the negroes in *America*, and the remaining part thereof, and also the wages which should afterwards become payable within 30 days next after the ship's arrival at her port of discharge in *Great Britain*: That the ship sailed from *London* on the 25th of *May*, 1779, and on the 1st of *August*, took a *Spanish* vessel, of which the plaintiff was appointed prize-master: That he carried her into *Lisbon*, where he continued, till *January* following, in the care of the prize and her cargo, and till the same were disposed of by the agent appointed by the owners of the *Winchcombe*, and afterwards, to his passage to *England*, and arrived on the 15th of *February*: That the *Winchcombe*, on the 3d of *September*, was taken by two *Spanish* men of war, in her passage to the coast of *Africa*, after the time limited for cruizing,

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[2] *Supra*, *Syers* v. *Bridge*, p. 527.

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ing, and before her arrival at the port or place of delivery of the negroes in *America*, mentioned in the articles, or at her discharging port in *Great Britain*, or at any other port whatsoever.

The question stated for the opinion of the court was, Whether the plaintiff was entitled to recover (£38 7s. 8d.) the whole of the sum demanded by the action [1], or any part of it? The case was argued on *Tuesday*, the 14th of *November*, by *Baldwin*, for the plaintiff, and *Erskine*, for the defendant.

For the plaintiff, it was contended, that the *justice* of his demand could not be disputed, since he had continued in the defendant's service till his return to *England*. He did not desert the ship, but left her by the command of the defendant. It is indeed laid down as a general maxim, That freight is the mother of wages; but the reason of that maxim is, that the sailors may have an interest in the safety of the ship, and may be thereby induced not to leave her in cases of danger, but to exert themselves in her defence; but, here, as the plaintiff had, by the orders of the captain, left the ship, he could not act at all in her defence, and therefore the reason does not apply in the present instance. The rule is certainly not universal, and without exception. If the ship is seized for debt, or for having contraband goods on board, it has been held that the sailors have a right to their wages up to the time of the seizure, because, though the voyage was never completed, *that* was owing to the act of the owners, and not to any negligence of the crew.

On the other side, it was insisted, that, as the ship was taken before any freight had been earned, the plaintiff could recover nothing for wages. If a mariner is *discharged*, he is entitled up to the time of the discharge, although the ship afterwards be lost, but here the plaintiff never was discharged. With regard to all questions concerning wages, the officers and common mariners are exactly on the same footing; as was held in the cases of *Hooke* v. *Moreton* (a), and *Baily* v. *Grant* (b). If the plaintiff had arrived from *Lisbon* before the arrival of the ship, and she had afterwards arrived safe, he, as well as the officers and crew on board, would have been entitled to wages up to the arrival; for he continued to belong to the ship, and was still subject to the same conditions with

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[1] Being at the rate of £5 per month, from the day the ship sailed, to that of the plaintiff's return to *England*.

(a) B. R. M. 10 *Will.* 3. 1 Ld. *Raym.* 397.

(b) B. R. 11, 12 *Will.* 3. 1 Ld. *Raym.* 632.

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with the rest of the crew. But suppose he should be thought to have acted in another capacity than as one of the crew, when he was employed in taking care of the prize, his remedy is not by proceeding for wages under the articles, (which was the only point gone into at the trial,) but he ought to bring an action, upon a *quantum meruit*, for work and labour. The court cannot now ascertain or apportion what he may be entitled to in that respect.

Baldwin, in reply, observed, that the sum might be easily apportioned. If the court should think the plaintiff entitled to wages for the time he was on board the ship, those wages would be calculated in the proportion of £5 *per* month, and, as there was a general count in the declaration upon a *quantum meruit*, he might, under that count, recover likewise what he earned during the time he had the care of the prize, which it would be reasonable also to allow at the rate of the stipulated monthly wages.

Lord MANSFIELD said, *Baldwin's* distinction seemed equitable, but that he thought it would be difficult to draw such a line, for that, after the plaintiff went on board the prize, he must still be considered as belonging to the *Winchcombe*.

Dunning, on the same side with *Erskine*, observed, that this ship had two characters, one, *that* of a privateer, the other, *that* of a merchantman. That, in like manner, the plaintiff had two characters,* the one, as an officer of a privateer, the other as belonging to a merchantman. In the first character, no wages were due to him. The chance of a share in prizes was the consideration for serving in that capacity; and the plaintiff had in fact received that consideration; and, if the ship had taken more prizes, his gains would have been proportionably increased. As belonging to the ship in her capacity of a merchantman, he must be subject to the general rule, and no freight having been earned, no wages were due.

The court took time to consider, and, as the case did not state the whole of the articles, Lord MANSFIELD directed a full copy to be sent him. It appeared, however, that nothing material had been omitted.

This day his Lordship delivered the opinion of the court, to the following effect:

[542] Lord MANSFIELD.—As a sailor on board a ship on a trading voyage, the plaintiff is entitled to nothing [r] ; for freight

[r] So, where a sailor expressly agrees by his articles, that he shall not be entitled to any part of his wages until the termination of a return

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freight is the mother of wages, and the safety of the ship the mother of freight. The plaintiff's counsel endeavoured to support his case on another ground, and contended, that he was entitled to a sum equal to his wages, upon the *quantum meruit*, for the care of the prize. The ship was a *letter of marque*, and, before her voyage, was to cruize for three months. All the crew were to share in what prizes might be taken, in certain proportions; and it is admitted that the plaintiff has had his share of the prize which was actually taken. The question then is, whether he can now make any demand, in the nature of wages, for the time he had the care of the prize; and the light in which it strikes me, is this. The ship sets out in a double capacity; she is to perform a trading voyage, and to carry negroes from *Africa* to *America*; but, before that, she is to cruize for three months as a privateer. All demand on account of the trading voyage is gone. But, in her character as a privateer, the crew are entitled to no wages. They all run equal risks, and take their chance of their respective shares in prizes.

The *postea* to be delivered to the defendant.

MEGIT *against* JOHNSON and Another, Administrators of LOWE.

Saturday, 25th Nov.

The effects of an intestate having vested in the crown by forfeiture, if letters of administration are granted to *A.* in consequence of a warrant from the king, and they run in the usual form, *viz.* "To pay debts, &c." but with this additional clause, "For the use and benefit of his majesty," *A.* shall be answerable as administrator for the debts of the intestate, and shall not be permitted to give evidence tending to question the validity of the letters of administration.

ACTION of debt on a bond. The plaintiff, in his *declaration*, averred, that, after the death of *Lowe* the obligor, administration of the goods and chattels of the said *Lowe*, at the time of his death, was duly granted to the defendants.—To this the defendants *pleaded*; 1. That such administration was not granted to them; 2. *Non est factum*; 3. That they had fully administered.—On the two first pleas *issue* was joined. To the third, the plaintiff *replied*; That, on the 23d of *January*, 1780, the defendants had divers goods and chattels, which were of the said *Lowe* at the time of his death, in their hands to be administered, with which they might have satisfied the plaintiff's debt.—Upon this replication *issue* was also joined.

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turn voyage, and the ship is lost by storm upon her return, he shall not recover *pro ratâ*, though freight has been earned upon the voyage outward, and in an intermediate voyage. *Appleby* v. *Dods*, 8 *East*, 300.

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The cause came on for trial, before Lord Mansfield, at *Guildhall*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case reserved. The case stated; that the plaintiff's demand arose on *a bond* given him by *Ralph Lowe*, deceased, dated the 6th of *January*, 1776, in the penal sum of £240, conditioned for the payment of £120, and that on this bond there was due to the plaintiff, at the time of the trial, the sum of £142. It then set forth *an inquisition* taken on the body of *Lowe*, before the coroner of *Liverpool*, on the 10th of *April*, 1779, by which, upon the view of the body, and the testimony of witnesses, it was found, that he, being confined in the gaol of that place on a charge of felony, had taken a large quantity of *laudanum*, on purpose to poison himself, and that he was *felo de se*. The case then set forth *three* other exhibits, *viz*. 1. *A memorial* by the defendants, as treasurers of the society called "*The Amicable Contributionship*, or *Hand-in-Hand Office*, for insuring houses and buildings from fire," to the commissioners of the Treasury. 2. *A warrant*, under the sign manual, in consequence of this memorial, directed to the advocate, and procurator-general, or either of them. 3. *Letters of Administration* granted thereupon to the defendants, by the archbishop of *Canterbury*. The substance of the *memorial* was; that *Lowe* had insured, at the office of the defendants, the sum of £2350 on a building, called the *Emanuel* hospital for the blind, in *Kentish Town*, and that the landlord of the building had also ensured £1200 upon it; that afterwards, the building was consumed by fire, and suspicions arising in the minds of the directors, that this had happened by the malicious and wilful act of *Lowe*, they had taken great pains to discover the truth, and bring him to justice, and, having received abundant circumstantial evidence of his guilt, they procured a warrant for apprehending him; that he was taken at *Liverpool*, and committed by the mayor, to the gaol of that place, to be conducted to *London* the next day; but that, to avoid public justice and disgrace, he poisoned himself, and died a few hours after his commitment; that, upon the inquisition before the coroner, he had been found *felo de se*, and was sentenced to be, and accordingly was buried in the king's highway; that he died possessed of a considerable personal estate, particularly [544] £700 capital stock, three valuable leasehold houses, besides furniture and other effects, which the memorialists were informed, had been, or were about to be, seised for the king's use; that the landlord of the hospital had demanded the £1200 of the office, and that they thought themselves bound to pay it, and intended so to do; and that, in prosecuting the enquiry and apprehending *Lowe*, the office had expended £90 7*s*. 6*d*. they therefore prayed, that they might be paid the said

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said sums of £1200, and £90 7s. 6d. out of the estate and effects of the said *Lowe*, or such parts of the said sums as to their Lordships should seem meet. The material part of the *warrant* was as follows: "We do hereby command, that "you appear on our behalf before the prerogative court of "*Canterbury*, and assert *our right* to the said personal "estate, and effects, of the said *Ralph Lowe*, and thereupon "obtain letters of administration, *for our use*, unto (the defendants,) they giving good and sufficient security, for their "duly administering *and accounting to us* for the same." The *letters of administration* were, in all respects, in the usual form and words, except, that, after the concluding clause, *viz.* "And we do, by these presents, ordain, depute, and appoint, "you administrators of all and singular the goods, chattels, and credits of the said deceased," these words were added, "*For the use and benefit of his majesty.*" After these exhibits the case proceeded to state, that the defendants had received, under the above circumstances, from the effects of *Lowe*, the sum of £1134 19s. 1d. and no more, and that, before the commencement of this action, they had paid the landlord of the hospital, £1205 5s. on his said claim, and had expended £90 7s. 6d. in prosecuting the aforesaid enquiry, and in the apprehending of *Lowe*.

If the court should be of opinion that the plaintiff, under the circumstances, was entitled to recover, a verdict was to be entered for him, with 1s. damages, and 40s. costs, and the *postea* to be indorsed, "That the defendants had possessed "assets of *Lowe*, sufficient to satisfy the plaintiff's demand." If they should think he was not entitled to recover, then a nonsuit to be entered.

The case was argued on *Friday*, the 24th of *November*, by *Rooke*, for the plaintiff, and *Davenport*, for the defendants. The court desired *Davenport* to begin.

He argued to the following effect.—As it appears that *Lowe* was *felo de se*, by the *record of* inquisition, *that* is conclusive evidence of the king's right, against all the world. There was a time in this country, when the crown had an immediate right to the effects of intestates, without the interposition of the ordinary, or metropolitan. This at least is laid down by Lord *Coke*, in *Henloe's case* (a). It is true the doctrine of that case is denied in *Manning* v. *Napp* (b). But, whether the law was so, or not, makes no difference in the present case; for, as the party died *felo de se*, the whole vested immediately in the crown, and the king might have taken possession of the effects by the ordinary process of extent, so that the letters of administration are to be considered as mere waste paper. I suppose, however, that, in practice, it has

(a) *T.* 42 *El.* 9. *Co.* 38. *b.*

(b) *B. R. T.* 4 *W.* & *M.* 1 *Salk.* 37.

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has been thought necessary, since the case of *Manning* v. *Napp*, for the crown to take the assistance of the ordinary, in appointing proper persons to *collect*, but such persons can have no authority to *administer*, the effects. Being *forfeited*, they are not the subject of administration. Before the statute of 13 *Edw*. 1. *st*. 1. *c*. 19, the ordinary could neither sue, nor be sued. If he got possession of the intestate's effects, he might keep them. By that statute, he was rendered liable for the debts of the intestate, as far as the goods should extend; and, by 31 *Edw*. 3. *stat*. 1. *c*. 11, he was made compellable to grant administration of the intestate's goods, to his next, and most lawful friends, who were thereby authorised to sue for debts owing to him, and subjected to suits for what he owed. But, in this case, could the ordinary have been sued under the statute of *Edw*. 1. or compelled to grant administration under that of *Edw*. 3? The intestate left no effects to be administered. The defendants are merely receivers. They cannot be sued, nor have they any right, *under the letters of administration*, to retain for any debts due by the intestate to themselves. It was absurd to make out the letters of administration in the usual form. However, the *additional* clause, properly, directs the defendants to act for the use and benefit of his majesty. The effects vested completely in the crown by the forfeiture, but as the insurance office suffered a material injury by the very act in consequence of which the forfeiture took place, they had a fair *equitable* claim, and they have received an authority to collect. But still the *strict right* is reserved; and the crown may dispose of the effects, when collected, as it thinks fit. Because it was held, in the case of *Manning* v. *Napp*, that the king could not grant such an authority by letters patent, the practice has been, for him to send to the ecclesiastical court, and to have a deputy appointed to collect the effects, for his behalf. It would be strange, if this assertion of his right should be construed to divest that very right, and to entitle the creditors to what by law belongs to the king. This action is founded on the supposition, that the defendants are liable to the debts, in consequence of the letters of administration; but the complete answer is, that no letters of administration have been granted to the purpose, and which have the effect, of making them answerable for the debts. If the plaintiff has any equitable claim, if he is entitled to favour, he should apply by petition, as the defendants have done. This action is founded upon a claim of strict right, and, if it is supported, the King will lose one of his great prerogatives, and the title of the crown found *of record*, by the inquisition, be divested by the act of the ecclesiastical court [† 112].

Rooke,

[† 112] *Vide Wentw. Office of Executor*, 134.

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Rooke,—This is not a new practice. It is of course for the treasury to assist parties in such cases, when they can shew such an equitable right. I admit that the crown does not take the goods of felons subject to their debts. But, although, by the prerogative, the property vests in the king discharged of all demands, I insist that he may wave, and that in this case he has waved, his prerogative in that respect. He may exercise the prerogative of mercy, in regard to forfeited property as well as life. Though this branch of the revenue, by the civil list act, makes part of the *aggregate fund*, yet an express power of disposing of it is reserved (*a*). As the power is undoubted, the only question is, in what manner it has been exercised in the present instance. Now it seems to be clear that the crown has directed administration to be granted for the general benefit of the creditors, reserving a right to dispose of the surplus; which no doubt was intended for the defendants. Is this inconsistent with law? Most certainly not. The ordinary is bound by statute to grant administration for the payment of the intestate's debts; but, even before any positive direction by statute, he was bound *in conscience* so to do, and the chancellor would now, independent of any statute, compel him. Here, both the crown and the ordinary are concluded; the crown, by the sign manual; the ordinary by the letters of administration. What was the intention of the crown, as it is to be collected from the proceedings? The letters of administration were granted upon the application of the king's advocate general, in consequence of a warrant from his majesty, and by them the defendants are, (in the usual form,) expressly directed to pay the debts of the intestate. The concluding words can only mean that they are to account to his majesty *for the overplus*. All parties interested have concurred in giving validity to the letters of administration; the king, by commanding his advocate to apply for them; the ordinary, by granting, and the defendants, by accepting them.

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Lord MANSFIELD asked, if there were many instances of this sort, (as had been alleged in the argument for the plaintiff,) and it seemed to be agreed, that it was common for the crown, in cases of outlawry, to grant a sign manual to the creditor who has prosecuted to outlawry.

His Lordship said, there was no doubt the justice of the case was with the plaintiff; but that there was a difficulty in point of law, *viz.* whether a right vested in the crown could be waved or relinquished in any other way but by matter of record. The king, his lordship seemed to think, could not, in point of law, resort to the ecclesiastical court for administration, the forfeiture having, *ipso facto*, vested the whole in him.

(*a*) 1 *An. st.* 1. c. 1. § 8.

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him. But then he asked, whether the defendants, who had, *de facto*, accepted these letters of administration, could now object to them. They were not, he said, void on the face of them; and, if they had been granted irregularly, recourse should have been had to the ecclesiastical court to repeal them.

Willes, and Buller, *Justices*, were of opinion, that, by the acceptance of the letters of administration, the defendants were precluded from questioning their validity, and operation, and Buller, *Justice*, thought that, for that reason, none of the evidence, which tended to impeach them ought to have been received at the trial.

Ashhurst, *Justice*, concurred in thinking, that, if the letters of administration had been in the usual form, the defendants were, by their acceptance, bound not to question their validity. But he said, that the ecclesiastical court, in this case, had no inherent authority to interfere; that it was only authorised to act in consequence of the sign manual, and that, according to the terms of the sign manual, the administration was to be granted, without any qualification in favour of creditors, for the benefit of the crown, and the defendants were to give security that they would duly account to the crown. The ecclesiastical court, therefore, had exceeded its authority, and the letters of administration, in as far as respected the payment of the debts, were a mere nullity; and there was no occasion to apply for a repeal of them. He agreed, that the justice of the case was with the plaintiff, and that he had a good ground to petition to be paid before the defendants, but was afraid, that, if the court should decide that the ecclesiastical court could, by such an act, divest the property of the crown, a dangerous precedent might be established.

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The court took time to consider till this day, when Lord Mansfield delivered their unanimous opinion, as follows:

Lord Mansfield, (after stating the case,)—Upon the whole of the facts, it was argued, by the counsel for the defendants, that the personal estate of *Lowe* was vested in the crown by forfeiture, in consequence of the suicide found upon record, and that this property could only be divested by matter of record, which letters of administration are not; that the plaintiff, therefore, had no right to recover against the defendants, but ought to apply to the favour of the crown. But we are all of opinion on consideration, that these letters of administration are not void on the face of them. There are many instances where such administration may be granted for the king's use. Suppose *Lowe* had been a bastard, or, being legitimate, had died without any next of kin. The king, in such case, would have taken, as *ultimus hæres*, but subject to the debts of the intestate. Not being void, we think the

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the court cannot, in this case, enter into the question, whether the letters of administration are voidable: and the ground of our opinion is, that the defendants, who have accepted and acted under them, shall not be permitted to deny their validity. *That* is *jus tertii;* and we are of opinion that the evidence on that part of the case ought not to have been admitted.

The *postea* to be delivered to the plaintiff.

The King *against* Whitbread.

[549] Tuesday, 28th Nov.

A *certiorari* will not lie to remove a conviction by the commissioners of excise for the double duties on beer.

A RULE had been obtained, in *Easter Term*, 20 *Geo.* 3. to shew cause, why a *certiorari* should not issue to remove a conviction, by the commissioners of excise, for the double duties on beer (*a*), into this court; and, in the same term, on *Wednesday*, the 26th of *April*, cause was shewn, by the *Solicitor-General, (Wallace,)* and *Wilson*.—*Dunning, Davenport*, and *H. Cowper*, argued in support of the rule.

It was opposed on two grounds; 1. It was contended, that a *certiorari* would not lie, in any case, to remove proceedings before the commissioners of excise; 2. That, in this case, there were not sufficient reasons laid before the court to induce them to grant the *certiorari*, even if it would lie.

Against the rule, on the general question, it was said, that there was not a single example since the first establishment of the board, where such a writ had issued, although they try several thousand causes in a year. As the statutes had established a court of appeal, *that* was the regular course of redress, which the legislature had pointed out, if parties thought themselves aggrieved by the determination of the commissioners. *Ball* v. *Partridge* (*a*) was cited, as a case in which it had been held, that, when a jurisdiction is vested, by act of parliament, in commissioners, a *certiorari* will not lie, unless it appear that they have exceeded their jurisdiction.

On the other side, it was insisted, that the case of *Ball* v. *Partridge* had been often over-ruled [1], and the daily practice was against it. It was an authority incident to the court to remove every conviction, and this could only be taken away by express words. In many cases under the excise laws, the power of granting *certiorari* is expressly taken away, which

(*a*) Under 12 *Car.* 2. *c.* 24. § 33.

(*a*) *B. R. T.* 13 *Car.* 2. 1 *Sid.* 296.

[1] *Rex* v. *Morely*, *T.* 33 & 34 *Geo.* 2. 2 *Burr.* 1040. 1042

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which is a strong argument to shew that in all other cases a *certiorari* will lie. Thus, by 6 *Geo.* 1. *c.* 21. § 20 & 21, it is expressly taken away, in the cases there specified.—Several authorities were cited(*b*),* but no clear instance of a *certiorari* directed to *the commissioners of excise* could be shewn.

The case stood over for the opinion of the court, which was delivered, this day, by Lord Mansfield, to the following effect.

Lord Mansfield,—Though great industry has been employed, no case was produced in which a *certiorari* has been granted to remove proceedings before the commissioners of excise. This circumstance alone affords a strong ground to suspect that none is grantable; for, in the multiplicity of business which [illegible] before them, it is natural to suppose, that some [illegible], dissatisfied, (whether right or wrong,) with their determination, would have wished to remove it before another tribunal. This has induced us to make further researches than the argument suggested, and to look very attentively into all the statutes on the subject. The statute of 6 *Geo.* 1. *c.* 21. has a clause, which was not observed upon at the bar, but seems very material. It is the 22d section. By the clause immediately preceding, (§ 21,) a *forfeiture* of brandy, arrack, rum, spirits and strong waters, is created in certain cases, and, in those cases, both appeal, and *certiorari*, are taken away. Then comes the section to which I refer, which inflicts a penalty upon the removal of sweets without certificate, and enacts that the sweets themselves, together with the casks in which they are contained, shall be forfeited, and liable to be seised by any officer of excise. It then goes on and says, "That every seisure and seisures of "such sweets, &c. and also every other *forfeiture* and *forfeitures*, which from and after, &c. shall or may be made, "by virtue, or in pursuance of any act, or acts, whatsoever, "relating to the duties of excise, or to any other duty, or "duties, under the management of the commissioners of "excise, shall and may be proceeded upon, heard, examined "into, adjudged, and determined, by the same ways and "means, and in the same manner and form, as is, and are, "herein and hereby prescribed, directed, or appointed, to "be done, upon seisures of brandy, arrack, rum, spirits, or "strong waters, not exceeding as aforesaid, and that such "proceedings thereon shall not be liable to any appeal, or "appeals, or to be removed by certiorari, any thing in this present act contained, or any law, statute, or provision, to the "contrary

(*b*) *Warwick, qui tam, &c.* v. *White,* [illegible] 3 *Mod.* 319. *Regina* v. *Towns-* *Bunb.* 106. *Rex* v. *Tindall,* [illegible] *Lond. B. R. M.* 1710 cited by *Cowper,* 2468. *Anon.* 1 *Salk.* 149. pl. 16. *Rex* from a *MS.* note of *Cowper,* Justice. v. *Theed,* 2 *Ld. Raym.* 1375 2 *Str.*

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"contrary thereof notwithstanding." These words are certainly very comprehensive, and seem large enough to include the present case; for this is a *forfeiture* of double duty. In the information it is stated, that the said *Whitbread* hath *forfeited* double the value of the said rates and duties of excise, and the adjudication is, That he do *forfeit*, &c. But, besides that this is the natural construction of the words of the clause itself, such construction is greatly corroborated by the statute of 1 *Geo.* 2. *st.* 2. *c.* 16. § 3. which was made expressly for the purpose of obviating some doubts that had arisen upon the general penning of the act of 6 *Geo.* 1. This third section of 1 *Geo.* 2. *c.* 16. after mentioning the 22d section of the former statute, proceeds thus: "In which "clause some general words are mentioned concerning other "*forfeitures* to be made, from and after, by virtue, or in "pursuance of any act or acts," &c. upon which words a doubt hath arisen, "whether, by the generality thereof, the "right and liberty of appealing to the commissioners of *ap-"peals*, from judgments given by the commissioners of excise, "in causes and prosecutions on account of forfeitures *and "offences* relating to the duties of excise, and the jurisdic-"tion and power of the commissioners of *appeals* to hear "and determine such appeals, and also the right and liberty "of *appealing* to the justices assembled at the respective "quarter sessions of the peace, in cases where judgment or "judgments happen to be given, by two or more justices "of the peace, in causes and prosecutions before them, for, "or on account of forfeitures, *and offences*, respectively re-"lating to the duties on malt, &c. be not taken away, and "repealed; now, for preventing and avoiding all such doubts "and questions, and declaring and *re-establishing* the right "and liberty of *appealing*, in the respective cases before "mentioned, be it enacted, that neither the said act, nor "any clause, matter, or thing therein contained, did, or doth "extend, or shall be construed to extend, or to have extended, "to take away, repeal, or alter, the right and liberty *of ap-"pealing*, in the respective cases before mentioned, or in "any of them, and the right and liberty of *appealing* in the "respective cases before mentioned, and the several jurisdic-"tions and powers, as well of the commissioners of appeals, "as of the justices of peace, assembled in their respective "quarter sessions, now, is, and are, and ought to continue, "and be in the same plight and condition, as the said right, "liberty, jurisdictions and powers, respectively was, and "were, before the making of the said act." It is observeable [552] on this clause of the statute of *Geo.* 2. that, in speaking of the doubts whether the right of appeal was not taken away, from judgments by the commissioners, in cases of *forfeitures* it adds, "*and offences relating to the duties of excise,*" which

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shews, that the legislature did not mean *specific* forfeitures only, but also *pecuniary* forfeitures, and, by mentioning *appeals* only, and not *certioraris*, (which are spoken of in the same breath in the act of Geo. 1. and, if there was a doubt about the one, there must have been the same about the other,) it seems plain, that the legislature intended, that *certioraris* should be taken away, and that the right of appeal only should remain. That it was thought such a distinction was proper, and that an *appeal* ought to be preserved, in cases where the *certiorari* was taken away, is plain, because, with regard to hides and malt, respecting which the *appeal* is saved, by the statute of Geo. 2. the *certiorari* is expressly taken away, by 9 *Ann.* c. 11. § 47. and 12 *Ann.* st. 1. c. 2. § 37 (a). As to the cases which were cited at the bar, most, if not at all of them, are inapplicable to the present question. The *Anonymous* case in *Salkeld* was before the statute of 1 Geo. 2. In *Warwick* v. *White*, the court of *Exchequer* took cognizance of the case, because the subject matter appeared to them not to be within the jurisdiction of the commissioners. In *Rex* v. *Tindal*, the application for the *certiorari* was on the part of the crown, and the judges said, the king could not be precluded but by express words, and the king is not named; nor can it be supposed that he is within the reason for taking away *certioraris* in any case, viz. to prevent vexation and delay. The only case which seems to apply, is that of *Rex* v. *Theed*. That, indeed, was a case before justices of the peace, but the statute of 6 Geo. 1. extends to proceedings before them. It does not, however, appear, that there was any litigation, in that case, about granting the *certiorari*, for the report mentions only the argument for, and against, supporting the conviction, and it is probable the prosecutor being advised that it might be maintained, (which was the decision of the court,) he did not think it worth while to object to the *certiorari*. We are all of opinion, that, in this case, a *certiorari* does not lie. But if it did, it must be granted upon cause shewn[✠], and, as [553] the *affidavits* in support of the present application, do not proceed upon any alleged want of jurisdiction, but contain objections to the conviction on the merits, the court would not grant the *certiorari*, if they had power to do it, for those objections are, more properly, the subject matter of an appeal, and the defendant has not chosen to resort to that remedy.

The rule discharged[1] [† 113].

(a) Vide also 12 Car. 2. c. 23. § 36.

[✠] *Vide infra*, 791. Note (2).

[1] There were two other rules of the same sort, which had been obtained by two other brewers, of the names of *Hall* and *Green*, at the same time with this, and were discharged at the same time, without argument.

[† 113] The following case was determined, *H.* 23 *Geo.* 3.

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The KING against [illegible].

The KING v. [illegible] [illegible].

This was a conviction, by two justices, upon the statute of 11 *Geo.* 1. c. 30. § 16. for [illegible] tea and spirits.

In the preceding term, *Peckham*, on the affidavit of the defendant and another person, obtained a rule for the two justices to shew cause, why a writ of *certiorari* should not issue, directed to them, to remove into this court, the records of conviction before them had, on the [illegible] of *June* last, against the defendant, for the forfeiture of eight bags of bohea tea, two bags of [illegible] tea, twenty casks of geneva, and one cask of rum, and treble the value thereof, by her incurred, for or by reason of her harbouring, keeping, or concealing the same.

On *Wednesday*, the 9th of *February*, *Wallace* shewed cause, and contended, 1. That, as the affidavit on which the rule was obtained went only on the merits, denying the truth of the charge, the court, if they had the power of granting a *certiorari*, would not do it, an inquiry into the merits being properly the subject matter of an appeal, and not competent to this court. For this he relied on the case of *Rex* v. *Whitbread*. But,—2. He argued that no *certiorari* would lie in this case. The offence was created by 11 *Geo.* 1. c. 30. § 16. and by § 32. of the same statute it is enacted, "That all fines, "penalties, and forfeitures, by this "act before imposed, and not concern-"ing the same [illegible], and "dividing whereof [illegible] directions "are not herein made, shall be sued "for, levied, [illegible] in such "ways, [illegible] "fine, penalty, or forfeiture [illegible] "may be [illegible] "virtue of [illegible] any law, or "laws, relating to his Majesty's re-"venues of excise, or any of them; "or by action, *&c.*" These general words have the same operation as if the specific clauses relative to [illegible] of jurisdiction contained in the former excise laws had been re-enacted [illegible] and were omitted merely to avoid unnecessary repetition. Now, by the statute of [illegible] *Car.* 2. c. [illegible] it is expressly enacted, (§ 42.) "That the "judgments which shall be given in "pursuance of that act by the com-"missioners of excise, and justices "of the peace respectively, shall be "final, *and not liable to be removed* "*by certiorari*, into any of the courts "at *Westminster*." By § 21. of the act of [illegible] *Geo.* 1. c. 21. the *certiorari* is *expressly* taken away as to the forfeitures created by that section; and, by § 22. *generally*, "As to every other "forfeiture which shall, or may, be "made, by virtue, or in pursuance, "of any act, or acts, whatsoever, re-"lating to the duties of excise, or any "other duties under the *management* "of the commissioners of excise." Accordingly, in *Rex* v. *Whitbread*, the court held, that, in consequence of that last mentioned section, no *certiorari* lay to remove a conviction under the statute of 12 *Car.* 2. § 33.

Peckham, in support of the rule, insisted, 1. That, on the merits, as [illegible] in the affidavit, the conviction could not be supported. The offence created by the statute, is, "*knowingly* to harbour, *&c.*" and, upon the construction of the word "*knowingly*," the court of *Exchequer* have established these distinctions, *viz.* 1. That, where the goods are found in the house of the party, the knowledge shall be presumed; 2. That, if they are found in his grounds, some direct evidence of his knowledge must be given; and, 3. That, if [534] they are found in an out-house belonging to him, the presumption shall not arise, unless it is shown that he himself kept the key. It may be true, that this court cannot decide upon the merits; but, by removing the conviction, they will see the evidence

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dence (a); and can decide, whether the justices have followed any of those rules of construction. The defendant swears, that she is a cripple, and unable to stir without crutches; that the tea was found in a barn 120 yards from her house, and the spirits at the distance of a quarter of a mile, in a ditch adjoining to her land; that there was no evidence of her knowledge before the justices; that, in fact, she knows nothing of the goods, and had no interest in them. If all this is true, she ought not to have been convicted.—2. There is no statute which has taken away the *certiorari*, in a case like the present. The act of 11 *Geo.* 3. *c.* 30. § 16. has no words of reference to those of 10 *Geo.* 1. *c.* 10. or of 6 *Geo.* 1. *c.* 21. The defendant does not object to the forfeiture of the tea and spirits; as to that point, she is willing to admit that the condemnation is conclusive, but not as to the treble value. The argument on the other side seems to be, that the general clause in 6 *Geo.* 1. *c.* 21. takes away the *certiorari* in all cases. But it has been determined, by the court of *Exchequer*, in the case of *Warwick* v. *White* (b), that the words of that statute are to be strictly, and literally, construed, and several subsequent statutes have, in express terms, taken away the *certiorari* in particular cases, which would have been unnecessary if it had been already taken away in all cases by 6 *Geo.* 1. Thus, by 8 *Geo.* 1. *c.* 18. § 16. it is taken away in the particular instances there mentioned. Can it be supposed that such a provision would have passed two years only after 6 *Geo.* 1. if the same thing had been already done by the act of that year? A similar express provision has been mentioned on the other side in 10 *Geo.* 1. *c.* 10.; and there is one of the same sort in 23 *Geo.* 2. *c.* 21. § 33. What is still more remarkable, in an act which passed so lately as 21 *Geo.* 3. called the *Cocoa* act, a general clause was introduced, which enacted as follows: "All judgments of the commissioners of excise, or justices of the peace, within their respective jurisdictions, for the condemnation of any commodities, goods or effects, seised, as forfeited under this, *or any other* act, or acts of parliament, relating to the duties of excise, or other duties under the management of the commissioners of excise, shall be, and shall be deemed and taken to be, as final and conclusive, to all intents and purposes whatsoever, as any judgment for the condemnation of any commodities, goods, or effects, given in his Majesty's court of *Exchequer* (c):" This clause was objected to in the House of Commons, and agreed to be expunged; but having somehow or other remained in the bill, and received the royal assent, another act was brought in, and passed that very session, for the purpose of repealing it (d). The clause, and the repeal, would have been equally nugatory, if the effect of 6 *Geo.* 1. *c.* 21. § 22. had been as general as is contended. There have, in fact, been many cases where *certioraris* have issued to remove convictions under the excise laws, and, as to the late determination in *Rex* v. *Whitbread*, it does not apply here, because that was a conviction by the commissioners of excise. Very soon after the act of 6 *Geo.* 1. *c.* 21. the case of *Rex* v. *Theed* happened, which is reported by *Strange*, and also by Lord *Raymond* (e), who must have known

(a) *Vide Rex* v. *Read, supra*, p. 486.

(b) *Scacc. E.* 1722. *Bunb.* 106.

(c) 21 *Geo.* 3. *c.* 55. § 47.

(d) 21 *Geo.* 3. *c.* 64.

(e) *M.* 11 *Geo.* 1. 1 *Str.* 608. 2 *Ld. Raym.* 1375.

1780.

The KING against WHITBREAD.

known the intention of that statute, having been *Solicitor-General* when it passed, and a judge when the case was decided. To that case may be added those of *Rex* v. *The Justices of Southampton* (*f*), which is reported by *Barnardiston*, and the rule for the *certiorari* entered in the rule-book of the crown-office, p. 242, and afterwards made absolute; a second case of *Rex* v. *Theed* (*g*); *Rex* (on the prosecution of *Redburn*) v. *Miller* & *Reeve*, *Justices of Berkshire* (*h*); *Hale* v. *Evelyn* & *Nash* (*i*); *Alexander* v. *The Justices of Berkshire* (*k*); *Rex* v. *The Justices of Essex* (*l*); and *Rex* v. *The Justices of Suffolk* (*m*).

Wallace, in reply,—

[555] The commissioners and justices of peace are put exactly on the same footing, by the different statutes on which I rely, within the limits of their respective jurisdictions, and, therefore, although the case of *Rex* v. *Whitbread* arose on a conviction by the commissioners, it is a solemn decision in point upon the present question. Several of the cases now cited for the defendant were mentioned in that case, particularly *Rex* v. *Theed*, to which the answer was, that the objection was not taken. The new cases now mentioned all passed *sub silentio*. There is no hardship in taking away the *certiorari*, for there is a remedy on the merits, by an appeal, from a conviction by justices, to the quarter-sessions; and, unless in matters of law, or form, a defendant would have no redress, if a *certiorari* were allowed. It is not yet settled, whether a conviction before justices, or the commissioners, would be a conclusive defence against an action brought by the party convicted. A bill of exceptions is now depending, which has been settled by agreement, in order to bring that question before this court (*a*). The clause in the *Cocoa* act was left in by mistake, and the officers of the crown, of themselves, brought in the act to repeal it. It was agreed to be omitted that the point might first be determined.

The court took time [to consi]der; and, on *Wednesday*, the 12[th] of *February*, Lord MANSFIELD [de]livered their opinion, to the followi[ng] effect:

Lord MANSFIELD,—This [c]ase has been argued, on the part o[f t]he prosecutor, on two grounds. [1]. 1. That by law, a *certiorari* is not gr[a]ntable; 2. That, if there were a pow[e]r in the court, in their discretion, to grant it, they ought not to do it upon the present occasion; because the [o]bjection is upon the merits, and not [to] the jurisdiction. 1. The case of *Rex* v. *Whitbread* has been cited, as in point. On the other side, it is said, that it does not apply, because the conviction there, was by the commissioners. But we are all clearly of opinion, that there is no distinction in that respect. The jurisdictions, by all the acts relative to the excise, are distinct in their limits; that of the commissioners is within the bills of mortality; that of justices, in all other places; but, in every other point of view, their powers are the same; and, wherever the statutes take away the *certiorari* in the case of convictions before the commissioners, they also do

(*f*) M. 3 G. 2. 1 *Barnardist.* 245.
(*g*) T. & M. 5 Geo. 2. 2 *Barnardist.* 16. 73. 1 *Sess. Ca.* 2d edit. 417.
(*h*) M. & E. 17 Geo. 3.
(*i*) M. 18 Geo. 3.
(*k*) M. 19 Geo. 3.
(*l*) 1779. Qu. the term?
(*m*) Qu. the year and term?
(*a*) I believe it never was argued.

1780.

The KING against WEL-BREAD.

so as to convictions before justices. However, notwithstanding this, we think *Rex* v. *Whitbread* is not an authority to govern this case. That was a conviction on a statute long prior to 6 *Geo.* 1 viz. 17 *Car.* 2 c. 2. Supposing it, therefore, clear, that the act of 6 *Geo.* 1 takes away the *certiorari* in the case of all forfeitures and penalties created before that time, it does not necessarily follow [r], that it is taken away in cases of forfeitures and penalties introduced since. The counsel for the prosecutor relied on § 49 of 11 *Geo.* 1. c. 30 and contended, that the general words of that clause re-enact those of 10 *Geo.* 1. c. 10. § 42. as much as if they had been expressly repeated. This is certainly true, as to the form and mode of prosecution and conviction, but it is not a consequence that it is equally true, as to what shall, or may, be done after conviction. If this is not clear, and we think it is not, then the old general rule applies, viz. that nothing but express negative words shall take away the jurisdiction of this court. This opinion is fortified by the words of 10 *Geo.* 1 c. 10. § 42. and by the second case of *Rex* v. *Theed* [† 114] by *Rex* (on the prosecution of *Raeburn*) v. *Miller*, and the other cases which have been cited, for, though the objection does not appear to have been taken in those cases, that very circumstance shews the general sense of *Westminster Hall*, and we are, therefore, all of opinion, that the *certiorari* is not taken away in the present case. 2. But, the motion has been made, not on an objection to the jurisdiction, but on the merits, and, in *Rex* v. *Whitbread*, the court thought, *that* would have been a sufficient reason for not granting a *certiorari*, if it had been otherwise competent. We all adhere to that opinion.

The rule discharged.

[† 114] That was a conviction on a clause in this very act of 11 *Geo.* 1. c. 30. § 27. The former case of *Rex* v. *Theed*, was on 8 *Ann.* c. 9. § 10.

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[r] So, where one statute subjected an offence to conviction before a justice, and took away *certiorari*, and a subsequent statute gave jurisdiction to the sessions to inflict further punishment *for the same offence*, but did not expressly take away *certiorari*, the court held that the proceedings before the sessions were removable by *certiorari*, and that the conviction before the justice was not. *R.* v. *Terrett*, 2 *T. R.* 735.

The End of MICHAELMAS *Term*, 21 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

HILARY TERM,

IN THE TWENTY-FIRST YEAR OF THE REIGN OF GEORGE III.

1781.

PEARSON *against* ILES.

Tuesday, 23d January.

The further recompence given by 5 El. c. 9. § 12. against a witness for non-attendance, must be assessed by the court out of which the process issued, not by the jury, or judge, at nisi prius.

ACTION of debt on the statute of 5 *El.* c. 9. § 12. the words of which are:

"That if any person or persons, upon whom any process out of any of the courts of record, within this realm, or *Wales*, shall be served to testify, or depose, concerning any cause, or matter, depending in any of the same courts, and, having tendered unto him, or them, according to his, or their countenance, or calling, such reasonable sums of money, for his, or their costs and charges, as, having regard to the distance of the places, is necessary to be allowed in that behalf, do not appear, according to the tenor of the said process, *having not a lawful and reasonable let, or impediment*, to the contrary, that then the party making *default, to lose and forfeit*, for every such offence, £10, and to yield such further recompence *to the party grieved*, as, by the discretion of *the Judge* of the court out of which the said process shall be awarded, according to the loss and hindrance that the party

which

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which procured the said process shall sustain, by reason of the non-appearance of the said witness, or witnesses; the said *several sums to be recovered *by the party so grieved*, against the offender, or offenders, by action of debt, bill, plaint, &c."

The plaintiff had *subpœnaed* the defendant to attend, as a witness, on the trial of an ejectment, in which he was lessor, and had paid him a guinea for his attendance, but when the cause was called on, the defendant was absent, and the plaintiff was non-suited; upon which he brought the present action.

The first count in the declaration stated the proceedings in the ejectment, the *subpœna*, and that the trial came on, but that the defendant, not regarding the statute in such case made and provided, nor fearing the penalty therein contained, although then and there solemnly called for, did not appear to give his testimony, although he had no lawful, or reasonable, let or impediment to the contrary, but refused and neglected so to do, in contempt of the statute, and that, by reason of his neglect in that respect, and, because the evidence he would have given, for the said *Richard Fenn*, (the plaintiff in the ejectment,) would have been material, and was necessary for the said *Richard* to prove and maintain his said recited declaration and the matter therein contained, the said *Richard*, for want of the testimony of the defendant, could not safely receive, and abide, the verdict of the jury, but, they having departed from the bar, and conferred, and agreed, among themselves, and then returned to the bar, the said *Richard*, being solemnly called, did not come, nor did further prosecute his said writ; that judgment of nonsuit was afterwards entered up against the said *Richard*, and £45 awarded against him, for costs and charges; that the ejectment was commenced and prosecuted, at the expence, and for the benefit of the present plaintiff; and that he had paid the £45 to the defendant in the ejectment, to avoid the execution on the judgment; that he had, besides, laid out, and expended in and about the prosecution of the said recited suit, a large sum, to wit, £35, and had also sustained damage, over and above those several sums, by reason of the defendant's not appearing, to the value of £100, and that, by reason of the said premises, and by force of the statute, an action had accrued to the plaintiff, *being the party aggrieved in this behalf*, to demand and have of the defendant, the sum of £190, to wit, the sum of £10, and his said damages.

There was another count, stating the proceedings in the ejectment more briefly, but to the same effect with the first, except that it alleged, that, besides paying the guinea to the defendant on serving the *subpœna*, the plaintiff had also promised to pay him such further reasonable sum of money, as his

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PEARSON against ILES.

his reasonable costs and charges should amount to, over and above the said guinea[1].

The verdict was, "That, as to the said sum of £10 in the last count of the said declaration mentioned, and as to the sum of £10, parcel of the £180, the damages in the said last count mentioned, the defendant owes the same several sums of £10 and £10 in manner and form, &c." and an acquittal as to the rest.

In *Easter Term*, 20 *Geo.* 3. a rule was obtained to shew cause, "why the plaintiff should not have judgment for £80, (*viz.* his own costs, and the defendant's in the ejectment,) besides the penalty of £10, and also for the costs of this action[2], to be taxed by the Master, for a *further recompence* to him, as the party grieved, in pursuance of the statute of 5 *Eliz.*"

This rule stood over among the peremptories, to *Trinity Term*, 20 *Geo.* 3. when the case was argued, on *Wednesday*, the 31st of *May*, by *Davy*, Serjeant, and *Morris*, against the rule, and by *Dunning*, and *Chambre*, for the plaintiff.

Against the rule, it was said, that, in all the old records and precedents, the declaration is only for the penalty. This was the first attempt to include the *further recompence* for damages, in the debt laid in the declaration. If the court should think themselves authorised to go upon this motion, into the consideration of the damages, they would also inquire into the merits of the verdict, and not hold the defendant concluded, even as to the penalty, by the verdict. Should the court enter into that consideration, and permit *affidavits*, then ready to be filed, it would appear, that there was a lawful and reasonable cause for the defendant's absence, and that the plaintiff had not suffered thereby; for that, having brought another ejectment, he was again nonsuited, for want of title.—(HEATH, *Serjeant*, who tried the cause, had ruled, that the question, whether there was a lawful and reasonable impediment, was matter of law, to be decided by the court, and not by the jury.)—It is, it was said, very difficult to put a clear construction upon the statute; some material words, as "*shall be assessed*," "*adjudged*," &c. seeming to be omitted in the common printed copy, which differs from

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[1] According to the declaration in *Goodwin* v. *West*, cited *infra*, p. 559. *Note* (*b*).—But, the declaration, in that case, was held to be ill, because the statute gives the action to the party *grieved*, and no loss or damage was specifically alleged.

[2] It was decided in the case of *Maddison* v. *Shore*, cited *infra*, p. 559. *Note* (*c*), that the plaintiff is entitled to costs in this action.

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from the original edition, but corresponds with the record at the *Rolls*.—(*Morris* said, he had compared them.)—They cited *Havithbury* v. *Harvey* (a), *Goodwin* v. *West* (b), *Maddison* v. *Shore* (c), and *Aston's Entries* 90 [3].

On the other side, it was insisted, that, though the statute is inaccurately penned, the meaning is plain. That the true construction is, that the damages should be ascertained by the court. The word "*recovered*," applies, it was said, to the judgment, not to the verdict, and, therefore, there could be no judgment, even for the £10 damages, until there should be an assessment by the court. The *quantum* of the damages could not be any matter of dispute, the two sums of £45 and £35 being the amount of the bills of the two attornies, in the original cause, both of which were paid by the plaintiff; and, as to the propriety of the verdict for the penalty, *that* could not be gone into upon *affidavits*, it being the province of the jury alone, to say, whether the circumstances were such as entitled the plaintiff to maintain the action.

BULLER, *Justice*, observed, that, by the statute, the damages, as well as the penalty, were made a *debt*, to be recovered by an action of debt, and accordingly were so *declared* for, and therefore asked, how the plaintiff had taken a verdict for any thing in the name of *damages*. He also took notice that the debt declared upon was £190.

To this last observation it was answered, on the part of the plaintiff, that this was not an action of debt of that sort in which it is necessary to recover the precise sum laid; and, as to the £10 given by the jury, in the name of damages, *that*, it was said, might be remitted, and judgment only entered for the penalty, and such damages as the court should now assess.

BULLER, *Justice*, then hinted, but said he did not mean to give an opinion, that the proper method of proceeding might be, for the court to be applied to, in the first instance, to assess the damages, by ascertaining the costs in the original cause, and then to bring debt for that sum and the penalty added together.

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To this *Dunning* answered, that there might be damages, exclusive of the costs on both sides, and, besides, the court could not, with propriety, make an assessment by anticipation, when it might turn out, on the trial, that the plaintiff had no cause of action.

Lord

(a) B. R. E. 31 *El. Cro. El.* 130.

(b) B. R. M. 14 *Car.* 1. *Cro. Car.* 522. 540 *S. C.* Sir *W. Jones*, 430. March 18.

(c) B. R. T. 9 *Will.* 3. 5 *Mod.* 355. *S. C. Comb.* 449. called *Shore* v. *Maddison*, and 1 *Salk.* 206. called *Shore* v. *Maddiston*.

[3] In that precedent the clause the statute is recited.

Lord MANSFIELD said, that, as there was no instance of a similar proceeding, since the statute, it would be proper for the court to take time to consider of their determination. His Lordship expressed some doubt, whether the payment, or tender, to the witness, for costs and charges, was properly laid.

Dunning said, that by the acceptance of the guinea, and the promise to pay such farther reasonable sum, &c. (as laid in the second count,) it had become unnecessary to make any farther tender [4].

The case stood over, and the defendant had leave to file *affidavits*, tending to diminish the *quantum* of the damages, but not such as might impeach the verdict; because *that* could only have been done on a motion for a new trial.

This day, Lord MANSFIELD, after stating the case, delivered the opinion of the court to the following effect:

Lord MANSFIELD,—It is admitted, that the plaintiff was £80 out of pocket, by reason of the nonsuit: but the question is, When, how, and by whom, the damages are to be assessed; whether before or after the trial; by the judge at *nisi prius*, the jury, or the court? In this case the jury took upon themselves to do it; and have given under the sum expended. Precedents were cited of actions of debt for the penalty, but there are none for the damages. We, therefore, took time to consider.—1. At the trial, it was proved, that the witness did not purposely and maliciously absent himself on the trial of the ejectment; that he did attend, and meant to give evidence, but, having consulted the plaintiff's attorney, about the time when the cause was likely to come on, *he* told him he would have time to go to see the camp; that, when the cause was tried, it was never mentioned to the judge, that a witness of the plaintiff's was absent, nor alleged, that there was any material evidence which the plaintiff had not been able to produce; no new trial was moved for, and there has been another nonsuit in a new action. There is, therefore, the strongest reason to think, that the defendant could not have given any material evidence, and I should have thought the conversation with the plaintiff's attorney, and the sort of leave given by him, a *reasonable let*, within the meaning of the statute. However, *that* was proper for the jury to decide, and there has been no motion for a new trial.—2. With regard to the construction of the statute; the courts of *Westminster Hall* most clearly now, (and they also did so before this statute,) [F] proceed against witnesses who wilfully absent themselves

[4] This seems to have been determined in *Goodwin* v. *West*, *supra*, p. 559. *Note* (*b*).

[F] This was quoted as an authority by Lord *Ellenborough*, in *Amey* v. *Long*, 9 *East*. 473; where it was decided, that a *subpœna duces tecum* is compulsory

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Pearson against Isles.

themselves, as for a contempt; and remit the punishment, if they redeem their offence by making satisfaction to the party. The legislature, by this statute, meant to give a further recompence of £10 in addition to what the court might assess as a satisfaction in damages. But it is not the jury, nor the judge who tries the cause, but the court out of which the process issues, by whom the assessment is to be made[5]. Upon such an adjudication, or assessment, there is no doubt but debt might be brought. But it never has been done. Why? Because there is a preferable remedy, by attachment. The jury, here, have done what the court ought to do. An action will lie for *damages*, against a material witness who absents himself without any excuse. But that must be an action *on the case*. In an action of *debt*, also, the jury may give *damages* for the detention of the debt. But the damages here given, are for the injury stated in the declaration. Perhaps, the real justice of the case would be to give leave, now, to move for a new trial, upon which, if granted, the defendant would have an opportunity of laying the cause of his absence before another jury. But *that* would be expensive, and we are, therefore, inclined to let the plaintiff take judgment for the penalty, and one shilling damages for the detention of the debt, if he will release the £10 for damages, there being the strongest suspicion that no injury was done. If these terms are not acceded to, we will give leave to move for a new trial.

The counsel for the plaintiff agreed to the terms proposed by his Lordship, and undertook further, by the desire of the court, not to bring an action on the case for damages.

[5] In the statute of 3 *Hen*. 7. *c*. 10. —giving costs and damages to an original plaintiff, in whose favour judgment has been affirmed, upon a writ of error,—"*Justice*" in the singular number, is, without the possibility of a doubt, made use of, instead of "*the* "*Court*:" for the words are, "By the "discretion of *the Justice* afore "whom the said writ of error is "sued," and there is no court of error consisting of only one judge.

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compulsory for the production of such document as the judge, at the trial, shall think the witness ought properly to be required to disclose: and that an action on the case lies against the witness for refusing to produce them.

The KING *against* the INHABITANTS of SANDWICH, otherwise SWANNAGE.

Saturday, 27th Jan.

Whether *houses* are to be rated to the poor in a different proportion from *lands*, must depend on local circumstances, and the court will not quash an order for rating them equally.

CERTAIN occupiers of lands, in the parish of *Sandwich*, or *Swannage*, in the Isle of *Purbeck*, in *Dorsetshire*, had appealed to the Quarter Sessions for that county, against a poor-rate; setting forth, in their notice of appeal, among other objections, "That the rate was unequal, and partial, because tenements and farms, consisting of houses, lands, or grounds, were, in such rate, or assessment, charged and assessed at one penny in the pound, and cottages, or dwelling-houses, at only three farthings in the pound, whereas such cottages, or dwelling-houses, ought to have been rated and assessed, on a *par* with tenements and lands, at one penny in the pound." Upon hearing this appeal, the justices quashed the whole rate, and ordered a new equal assessment to be made, stating the following case for the opinion of this court:

That it was proved, on hearing the appeal, that the rate was an assessment of one penny in the pound on the occupiers of lands, and three farthings in the pound on the occupiers of cottages and dwelling-houses, according to their then annual rents; that, from the year 1735 to the year 1776, a constant distinction had been observed, in rating houses and lands, the former having always been rated in less proportion to their rents, at the respective times of such rating, than the latter; that the land in general, in the parish of *Swannage*, is burthened with no particular charges that are not incident to land in general; but that both lands and houses are subject to the usual repairs, and taxes, generally incident to each respectively.

The proceedings having been removed by *certiorari*, the case was now argued, by *Rooke*, against the order of Sessions, and *Dunning*, in support of it.

The court having desired *Rooke* to begin, he stated, that, on a late occasion, in a case from this parish, the court had hinted, that a distinction ought to be made between lands and houses, in consequence of which, as well as in compliance with the usage from 1735 to 1776, this rate had been made. It is, he said, the general practice throughout the kingdom, to rate houses lower than lands, because they require continual repair. He also objected, that the notice was too general, for that it ought to have specified, *nominatim*, the particular houses and cottages, that were *under*-rated, and the lands that were *over*-rated. And he contended, that, at all events, it was not necessary to have quashed the whole rate;

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that

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The King against Swanage.

that the assessment on the lands ought to have remained, and the rate to have been amended, by increasing the sum assessed on the houses. On this last head, he cited *Rex* v. *Witney* (a), and *Rex* v. *Ringwood* (b).

Dunning, on the other side, insisted, that the court never had, and never will, lay down a general rule that houses should be rated lower than land. The proportion between them must depend on local circumstances; and there were, he said, local circumstances in this parish, which made it reasonable that they should be equally rated. One which he suggested was, that nine tenths of the burthen of the poor arise from the houses. The rate, he contended, could not have been amended, for the objection affected the whole. A rate is a distribution of a given sum, over a certain number of persons and, if the quota charged on one or more persons is too high or too low, the proportion assessed on all the rest ought to be altered [☞].

Lord MANSFIELD,—1. There can be no general rule as to the proportion between lands and houses [† 115]. It must depend on particular local circumstances. There are no circumstances stated in this case, to shew that houses ought to be rated lower, and, if what is suggested is true, *that* is a strong circumstance the other way.—2. The objection unavoidably goes to the whole rate, for it is made, throughout, by a rule and proportion which the justices thought wrong; and, therefore, they could do nothing but quash the whole.

The order of sessions confirmed.

(a) E. 10 *Geo.* 3. *Bott*, 34 Since reported, 5 *Burr.* 2634

(b) T. 15 *Geo* 3. Mentioned in a note in 4 *Burr* 2295.

[☞] This has been since expressly determined, *Rex* v. *Maddern*, H. 27 *Geo.* 3 1 *Term Rep.* 625. Yet *vide Rex* v. *Cheshunt*, T. 28 *Geo.* 3. 2 *Term Rep.* 623 [r].

[† 115] *Vide Rex* v. *Brograve*, M. 10 *Geo.* 3 4 *Burr.* 2491. 2493. *Rex* v. *Lakenham*, E. 25 *Geo.* 3.

[r] By 41 *Geo.* 3. c 23 s. 6. power is given to the justices at sessions to *amend* rates even by *inserting* persons omitted; and it is provided that notice be given in such cases to the parties interested; who are entitled to be heard on the appeal. By this statute, the amending or quashing of rates seems fully left to the discretion of the sessions, according to the circumstances of the case. See s. 1.

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The KING *against* the INHABITANTS of HECKMONDWICKE.

Saturday, 27th Jan.

ORDER of removal of *Frances* the wife of *Abraham Preston*, a soldier, and *Joseph* their child, from the township of *Batley*, in the West Riding of *Yorkshire*, to *Heckmondwicke*, in the same Riding, confirmed by the court of Quarter Sessions, who state the following case: "That — — *Preston*, widow, the mother of the said *Abraham Preston*, the husband of the pauper, occupied a dwelling house in the township of *Batley*, and was rated and paid all assessments, till the time of her death, which happened on the [illegible] of *March*, 1778, that upon her death the said *Abraham Preston* became tenant of the said house, [illegible] until the year 1780, and, during all that time, paid all the assessments charged on the said house [illegible] it was known to the parish-officers of *Batley* that the said [illegible] *Preston* was dead, and that the said *Abraham* was tenant and occupier of the said house, and that the assessments being produced, [it] appeared that the name of [illegible] *Preston* was continued therein."

It became a [illegible] occupier [illegible]

Cockell argued in support of the order of removal, and cited *Rex* v. *Sarratt* (a), *Rex* v. *Bramshaw* (b), *Rex* v. *Carshalton* (c), and *Kinfare* v. *Kingswinford* (d), which last he insisted on as a case exactly in point with the present.

Fearnley was to have argued on the other side, but was stopped by the court.

Lord MANSFIELD.—There must be such a rating and paying as to shew manifestly that the parish had notice. Here the rate was continued in the name of a dead person; [illegible] the parish-officers knew to be dead [illegible] and was the occupier, and the charge was made upon [illegible] and could be on nobody else.—This has been determined very lately in a case where the article in the rate was "Late *Lowbridge's*" [1].

Both the orders quashed [† 116].

(a) M. 9 Geo 2 Burr. Settl. Ca. No. 21. S. C. 2 Str. 1022.

(b) M. 10 Geo 2 Burr. Settl. Ca. No. [illegible]

(c) [illegible] 25 Geo. 3. Burr. Settl. Ca. No. 262.

(d) E. 4 Geo 2. Fol 137. Burr. [illegible] 29 S C mentioned in Burr. Settl. Ca No. 29 p 99

[1] Rex v. Walsal, M 18 Geo 3

[† 116] Vide Rex v. St John's, P. 19 Geo 3. supra, p. 225 and Rex v. Mitcham, E 23 Geo. 3. supra, p 226. Note [† 65]

[*] By 35 G. 3. c. 101. s. 4. no settlements to be gained by paying taxes in respect to a tenement of less than £10 yearly value.

Saturday, 27th Jan.

GOODTITLE, Lessee of CLARGES and Earl FERRERS, *against* FUNUCAN.

Where there is a power to grant leases *in possession*, but not by way *of reversion or future interest*, a lease *per verba de præsenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Under a power to lease *all manors, messuages, lands*, &c. so as *there be reserved as much rent as is now paid for the same*, such parts of the estate enumerated in the power as have never been demised may be let.—2. If a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, and void.

THE material facts of this case were these:

Washington, the last Earl *Ferrers*, was tenant for life, under a settlement made in 1741, in which there was the following power:

"That it shall be lawful for the tenants for life, respectively, from time to time, and at all times during their respective natural lives, and when they shall respectively come into, and be in, *the actual possession* of the *aforesaid manors and premises*, by virtue of the limitations aforesaid, by indentures under their hands and seals, to demise all or any of the said *manors*, messuages, lands, tenements, and hereditaments, hereinbefore mentioned, or any part thereof, to any person or persons whomsoever, in *possession, but not by way of reversion or future interest*, for the term of twenty-one years absolute, or any lesser absolute term; or for any term or number of years determinable upon one, two, or three lives, so as, *upon every such lease or leases, respectively*, there be reserved and made payable, during the continuance of such lease or leases, respectively, to be incident to, and go along with, the immediate reversion or remainder of the premises so leased, *so much, or as great yearly rents as, or more than now is, and are paid*, and yielded, or agreed to be paid and yielded, for the same [*1], or proportionably for any part thereof."

All the lands comprised in the settlement that lay in the parish of *Sutton St. Anne's*, (except about thirteen or fourteen acres, and two or three cottages,) were part of a large common field. In 1774, an act of parliament (a) passed, for inclosing this common, and an allotment was made to Earl *Washington*, in lieu of his interest in the common. On the 15th of *March*, 1775, before the inclosure took place, his

(a) Priv. Acts, 14 Geo. 3. c. 27.

[*1] *Buller*, J. in *Powcey* v. *Partington*, *infra*, *cit.* said, that "the court, in this case, relied much on the words at the end of the power, 'proportionably for any part thereof;' for those words shewed that it was the intention of the parties, that the quantum of the rent, and not any particular part of the premises included in the settlement, was to guide the person in the execution of the power."

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his agent, by his lordship's authority, let the new allotted lands, by agreement in writing, to three persons, *Palmer*, *Bramley*, and *Jelley*, at the value set upon them by the commissioners under the act of parliament, to occupy till the 10th of *March*, 1776. On the 17th of *August*, 1775, Earl *Washington*, by indenture, reciting the power, demised to the defendant *Editha Maria Funucan*, for 99 years, from *Lady-day* then last past, if she should so long live, at the yearly rent of £134 (which was recited to be more than was paid for the demised premises at the time of the settlement,) *all the manors and fishery*, with the rights, &c. and the messuage, lands, &c. in *Sutton St. Anne's*, then in the occupation of *Palmer*, *Bramley*, and *Jelley*, as under-tenants of the said *Editha*, or in whose possession soever the same then were, or had been. The defendant covenanted to pay half the land-tax, (amounting to about £7 10s.) and the Earl covenanted, for himself, *his heirs, executors, administrators, and assigns*, to free the defendant from tithes, and from levies and payments for the church. The rights to shoot and fish were reserved to the lessor and those in remainder. By the enclosure act, the lands were discharged from tithes, and an allotment in lieu thereof made to the rector. The manors, or manerial rights, had never been let before. The fishery had been let before, but was not at the time of the settlement. Since that time, it had been again let at 15s. The £134 payable by the defendant was about £30 more than the demised premises had ever produced before. That part not comprehended in the agreement above-mentioned with *Palmer*, *Bramley*, and *Jelley*, was, at the time of the lease, in the occupation of tenants at will. At the time of making the lease, the Earl directed the occupiers to pay their rent to the defendant, and they accordingly did pay her all the rent which accrued afterwards.

After the death of Earl *Washington*, an ejectment was brought against Mrs. *Funucan*, to recover the demised premises, and a verdict found for the plaintiff. But a new trial having been granted, the cause came on, before EYRE, *Baron*, at the last *Lent* assizes for the county of *Nottingham*, who left it to the jury, whether the attornment of the occupiers to the defendant, in consequence of the directions given them at the time of making the indenture, did not amount to a surrender by them, and whether they were not to be considered as having become, thereby, parties to the lease, and as having put the defendant in possession; and the jury were of opinion with the defendant, and found a general verdict for her.

In *Easter Term*, 20 *Geo.* 3. a rule for a new trial was again granted, and, in that term, the case was argued, by several

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several counsel of a side. It was then insisted, that some of the premises, for which the action was brought were situated in the parish of *Sutton St. Michael's*, and this appearing to be the case, the plaintiff had judgment as to them, the title of the defendant only extending to *Sutton St. Agnes*. But as to the rest, the court directed that the case should stand over, to be argued again, by one counsel of a side, and that *affidavits* should be produced, to clear up some facts, not fully stated in the judge's report.

In last *Michaelmas Term*, on *Friday*, the 17th of *November*, *Hill*, Serjeant, argued for the plaintiff, and the *Attorney-General*, for the defendant.

For the plaintiff, three points were made. 1. That the lease to Mrs. *Funucan* was a lease in reversion, and, therefore, contrary to the power, and void. 2. That the manors and fishery were not demiseable under the power. 3. That the covenants in the lease were not so beneficial to the remainder-man, as those in the ancient leases.—1. It was contended, that Earl *Washington*, at the time of the demise to the defendant, could not grant an immediate lease in possession, because part of the premises were then let, under an express agreement, for a term, of which several months were still to run, and though the rest was stated to have been in the hands of tenants at will, yet, as the law now stands, they must be considered as tenants from year to year, and entitled to six months notice. Lord *Ferrers* could not have brought an ejectment against any of them, at the time of the demise, and therefore had no immediate possessory right; such right, and the right to recover in ejectment, being convertible. The clause in powers, confining tenants for life to grant leases only in possession and not in reversion, was borrowed from the statutes relative to ecclesiastical leases. In *Hunt* v. *Singleton* (*a*), a lease for forty years, by the Dean and Chapter of *St. Paul's*, of a house in *London*, though made to commence *immediately*, was held to be void, under 14 *El.* c. 11. § 10. because, at the time of making it, the house was already in lease, to a stranger, for 10 years; the words of the statute being "that no lease shall be permitted to be made, by force of this act, in *reversion*," &c. the authority of that case, though questioned [illegible] and, on another point, as allowed in 10 *Co.* 59. was confirmed by the *Dean and Chapter of Westminster's Case*, in *Carter* (*b*). In like manner, in a case upon a power, *viz.* *The Duke of Buckingham* v. *Lord Antrim* (*c*), the words of the power being, "to make leases for 21 years in *possession*," leases, though made to commence *in præsenti*, yet being of lands then under [illegible] lease [illegible]

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(*a*) C. B. E. 39 El. Cro. El. 564. [illegible] (*c*) [illegible] Case, H. 14 & 15 Car. 2.
(*b*) C. B. M. 16 Car. 2. Carter 93. 1 Sid. 101. 1 Gilb. 327. [illegible]

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lease, were held to be void, by the *Lord Chancellor*, assisted by the *Chief Justice* of the *Common Pleas*, and the *Chief Baron*. It makes no difference, as to this question, that the subsisting leases were not by deed, since a parole lease for three years, or less, is equally effectual with a lease by indenture; and the court cannot draw the line, and say, that a lease granted under a power, like the present, shall be good, although there is a subsisting term for seven *months*, at the time of granting, but shall be void, if there is a subsisting term for seven *years*. The legislature only, or the parties, can draw such a line. In *the Dean and Chapter of Westminster's* case, it is the doctrine of Sir *Orlando Bridgman*, the father of conveyancers, and who, probably, invented these very powers, that "all leases, where there is a *particular* "estate out, are leases in reversion (*b*)." The interposition of the legislature, in 4 *Geo.* 2. *c.* 28. § 6. to enable landlords to renew leases, for lives, on the surrender of the former leases, although the under tenants should not likewise surrender, corroborates this doctrine.—2. With regard to the manors and fishery, the power cannot be extended to them; the manors had *never* been let; the fishery was not, at the time of the settlement; and the power requires the rent *then* paid, or more to be reserved. Things, for which *no* rent was *then* paid, could not be meant to be comprehended. This will avoid the whole lease: for one entire rent is reserved, and it cannot be apportioned. Thus, in *Mountjoy*'s case (*c*), there being a settlement, under an act of parliament, by which it was declared, that the tenants for life should not alien, bargain, give or sell, any of the said castles, manors, *&c.* nor any part thereof, but only for, *&c.* "yielding the true "and ancient rent of the said lands and tenements, so by "them letten as aforesaid, *&c.*" and the moiety of a manor comprised, *with other things*, in the settlement, having been demised at an *entire* rent, and a special verdict having found that the manerial rights had never before been demised, the [569] court determined, that the lease was totally void, holding that nothing could be demised under the restraining clause in the act, unless what had been let, and had yielded rent, before; and though some part of what was then demised had been let before, yet the rent could not be severed and apportioned. To the same effect are the cases of *Tristram* v. *Lady Baltinglass* (*d*); and *Bagot* v. *Oughton* (*e*). In that last case there

(*b*) *Carter* 14.

(*c*) *M.* 26 & 27 *El. Moore* 197. *S. C.* 5 *Co.* 3.

(*d*) *C. B. H.* 19 & 20 *Car.* 2. *Vaugh.* 28. *S. C. Sir Th. Jones*, 27.

(*e*) *B. R. M.* 12 *Geo.* 1. *Fortes* 332. 8 *Mod.* 249.

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there was a certificate of the Judges of the *King's Bench*, to whom it had been referred by the *Chancellor*, as appears by the Register's books; but the certificate has been lost, and no decree can be found, although it is said, in 8 *Mod.* (*f*) that there was one, and that it was affirmed, on an appeal to the House of Lords [1]. There is another case of the same name, and between the same parties, in 1 *P. Will.* (*g*), but it is upon another point.—3. In the former leases, the tenants covenanted to pay all duties and taxes except the land-tax; church dues, particularly, are, by law, chargeable on the occupier; but, by the present lease, the landlord covenanted to free the defendant from tithes, and all levies and payments to the church; these new covenants, therefore, are less beneficial to the remainder-man—(The only proof given, that the covenants in the former leases were as just stated, was an *affidavit* of a former tenant, which was now put in, and read)—If the rent and covenants, reserved and made, in favour of the reversion, are not as beneficial as the power requires, *that* will be sufficient to vacate the lease: *Orby* v. *Monson* (*e*), *Lord Cardigan* v. *Montague*, cited in *Atkins* v. *Horde* (*f*).

The *Attorney-General*, on the other side, argued,—1. That the power being recited in the lease, it was manifestly the *intention* of Earl *Washington* to comply with the terms of it, and, with regard to the supposed subsisting leases, it had been very reasonably argued at the trial, that the agreement for the new lands was not so properly a lease, as a licence to take the crop, and produce, till the time when it was thought the inclosure would be compleated; and it was left to the jury, and they found, that the defendant was in possession of all the premises, at the time of granting the lease. But, it is impossible the construction of the power contended for on the other side can prevail, for, if it should, no lease under such a power could ever stand, unless every tenant under an agreement for a year, or at will, should come in, and make a formal surrender, and remove entirely, with all his effects, from the possession. The cases cited went upon subsisting leases under seal. The words of this power are, "not by way of rever-"sion, or *future interest*;" this was not a future interest; it commenced immediately, and the immediate attornment of the then tenants, was the same thing, in substance, as if the defendant had granted them new leases.—2. The qualification in the power, with regard to the reservation of the rent then

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(*f*) 381.

[1] Hill, Serjeant, said, it is very common for certificates to be lost, because the parties save a small fee by not filing them.

(*g*) 348.

(*e*) In *Canc.* 1705, 1706, 2 *Vern.* 531. 542.

(*f*) *B. R. H.* 30 *Geo.* 2. 1 *Burr.* 60. 122.

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then paid, can only apply to such parts of the subject of the power as were *then* let, but the power itself expressly extends to the manors and fishery, and it must have been known, at the time of the settlement, that neither the manors nor fishery were at that time let, and that the manors never had been. Where a general authority is given, by a power, to let manors, lands, &c. and, afterwards, there is a qualification, as in the present case, that the usual rent, or the rent for which the lands are then let, shall be reserved, such affirmative qualification shall not restrain the generality of the power, but shall only apply to that part which had been formerly demised. In *Cumberford's* case (a), the power was, to grant leases of the premises, or any part thereof, for, &c. "*so that* such rent or more, be reserved upon each lease, as was reserved or paid for the same, (*pur ceo*,) within two years then next before;" *part* of the land had not been let within the two years before, but it was held, that such part might be let, reserving what rent the lessor pleased; "for, (says the report,) it appears by the generality of the words, that he has power to lease all the lands, and this does not resemble leases made by force of the statutes of 32 *Hen.* 8. or 13 *Eliz.* for, in those statutes, the intent is apparent that no land should be leased except what had been let before [F 2]." The same rule is adopted, and confirmed in the case of *Walker* v. *Wakeman* (b), reported by *Ventris*

(a) *T.* 10 *Car.* 1. 2 *Roll. Abr.* 262. *pl.* 15.

(b) *B. R. H.* 27 & 28 *Car.* 2.

[F 2] In *Pomery* v. *Partington*, 3 *T. R.* 675, Lord *Kenyon* is represented to have said, that the counsel, in stating *Cumberford's* case in this argument, omitted the most important words, namely, that the intention of the parties was to govern. It seems, however, on comparing this quotation with the text in *Rolle*, that it is an accurate and literal translation of the whole of the passage on this subject. In that case the law of *Cumberford's* case appears to have been directly over-ruled; and the whole of the doctrine of Lord *Mansfield* in the principal case, with respect to the intent of the parties, (as collected from the nature of the property, as well as from the expressions of the power) is referred to with equal approbation. In *Doe* v. *Calvert*, however, (*infra, cit.*) considerable slight is cast upon the authority of *Pomery* v. *Partington* by *Lawrence, J.* who was counsel in it. But the decision there, however at variance with *Cumberford's* case, is perfectly consistent with the principal case; which may stand on the express particular words, "manor and fishery," inserted in the power, in contra-distinction to general words, which would only *comprehend*, but do not *necessarily point at* the matter in question.

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Ventris (c) and *Levinz* (d), and is cited as clear law, on the authority of those cases, by Lord *Holt*, in the case of **Winter* v. *Loveday* (e). In the case of Lord *Mountjoy*, which has been cited from *Moore*, and is also reported by Lord *Coke*, there was no general authority first given, and, in *Tristram* v. *Lady Baltingluss*, in *Vaughan*, the power of letting is expressly confined "to such of the premises as at any time theretofore had been usually letten or demised (f)." That case was decided a very few years previous to that of *Walker* v. *Wakeman*, and, if it had established any thing like the doctrine contended for on the other side, would, most undoubtedly, have been cited on that occasion. With regard to the case in *Fortescue*, it never went farther than a reference to a court of law; but, according to *Fortescue's* account of it, the authority of *Cumberford's* case, and of *Walker* v. *Wakeman*, was not denied, but the Judges distinguished it from them, and thought it resembled the case in *Vaughan*. But, it is objected, that as the rent is entire, and cannot be apportioned, it is not clear that the ancient rent is reserved for *that* part of the premises which had been formerly let. In answer to this, it is sufficient to observe, that the advance on the whole is £30, and that the fishery is only worth 15s. *per annum*, and the manor does not appear to be of any pecuniary value.—3. As to the third point, the power contains nothing about usual covenants. But, besides, it will be found that the alteration in the covenants is beneficial to the remainder-man. The church-dues cannot be equal to half the land-tax, which the tenant is now to pay. If they were, proof of their amount would no doubt have been given at the trial. As to tithes, none are payable; and, at all events, surely the additional £30 is much more than equivalent to the new burthens supposed to be imposed on the remainder-man. But, suppose the covenant to pay the church-dues, and tithes, not counterbalanced by the new stipulations in favour of the landlord, *that* covenant will not bind those in remainder. It is a covenant by Earl *Washington*, for himself, his heirs, executors, administrators, and assigns.

Hill, Serjeant, in reply, insisted, that no satisfactory answer had been given on the *first* point, a parole lease being equally a *particular* estate with one under seal. As to the *second*, he admitted that there are contradictory authorities, but observed, that the last, in point of time, (*viz.* the case in *Fortescue*,) was in his favour; and it was only an over scrupulous delicacy that induced the Judges, in that case, not expressly to deny the law of *Walker* v. *Wakeman*. On the third

(c) 1 *Vent.* 294.
(d) 2 *Lev.* 150.
(e) *B. R. M.* 9 *Will.* 3. 12 *Mod.* 147. 151. *S. C. Carth.* 427.
(f) *Vaugh.* 29.

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third point, he said, he thought the remainder-man, or the heir, or executor, of the lessor, might be sued on the covenant for tithes and church payments, at the option of the lessee; but, BULLER, *Justice*, said, he thought otherwise; that the lessee had all she had bargained for, by her remedy against the representatives of the lessor, and had agreed, by the terms of the covenant, that it should not run with the land. ASHHURST, *Justice*, seemed to doubt, as to this, and mentioned the case of Sir *John Astley*'s leases, where the court had decided that the remainder-man should have the benefit of covenants for rent, though, by the words, the lessee covenanted only with the lessor, *his heirs and assigns*.

The court took time to consider, Lord MANSFIELD saying that he was not prepared to give his opinion, having lost his papers, and the notes he had taken on the former argument [1].

This day, his Lordship, after stating the case, delivered the opinion of the court, to the following effect:

Lord MANSFIELD,—There are three objections made to the validity of this lease. 1. That it was a lease in reversion: 2. That the manors and fishery are not within the power, because they paid no rent at the time of the settlement: 3. That the covenants are not so beneficial to the landlord as those in the ancient leases.—1. On the first head, it was contended, as to the old enclosed lands, that there is no such thing now as a tenant at will; that Earl *Ferrers* could not have brought an ejectment for those lands, without giving six months notice; and that whoever cannot maintain an action of ejectment, is not in possession; and, as to the new allotted lands, that there were several months of the term under the agreement still to run. But *three* answers were given to this objection, every one of which, if valid, is decisive. The *first* is, that the tenants agreed to this lease, and surrendered their possession, before the execution of it, in order to make it valid. This was expressly left, by Mr. Baron EYRE, to the jury, who found, that the defendant was in possession at the time of the execution. The *second* answer is, that, if the jury had not found the defendant to have been in possession, still this would be good as a concurrent lease [F 3]. For this *Read* v. *Nash*

[1] Probably when his house was burnt by the rioters.

[F 3] *Acc. per Curiam. Roe* v. *Prideaux*, 10 *East*. 185. Otherwise, if it were a freehold lease (under such a power) which cannot take effect in *futuro*. In which case it was held, that under a power authorising leases, either for twenty-one years, *or* for three lives, a lease for ninety-nine years, determinable

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Nash (a) was cited [2], where, under a *proviso* to grant leases *only for* 21 *years*, a lease had been granted in 4 *Ph. & Mar.* for 21 years, and afterwards, 18 *Eliz.* a year before the expiration of that lease, another was granted, of the same premises, for 21 years, to begin *presently*, and it was held, that the second lease was good. The reason given is a strong one, *viz.* that the inheritance was not charged, in the whole, with more than 21 years (b). No authority was cited against this case, nor any answer given to the reasoning in it. The words of 13 *Eliz. c.* 10. as strongly require ecclesiastical leases to be in possession, and not in reversion, as those in this, or any of the common powers to tenants for life; yet, in the case of *Fox* v. *Collyer* (c), all the Judges held, that an immediate lease for 21 years, of premises on which there was a subsisting lease for four years, was good. The 18 of *Eliz. c.* 11. restrained the right to make such concurrent leases, to cases where the old lease had not more than three years to run. The *third* answer is, that, in respect of the power, all the subsisting leases were leases at will [1]; there was no out-standing lease, as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the case of leases under the power, (and there were not, in many respects, according to it,) the possession would devolve upon him, the instant of the death of the tenant for life. Therefore, we are all of opinion against the first objection. 2. As to the second point;

(a) *B. R. T.* 31 *El.* 1 *Leon.* 147.

[2] Probably on the first argument, which I did not hear.

(b) 1 *Leon.* 148.

(c) *Cam. Scacc. T.* 25 *El.* 1 *Anders.* 65. The reporter says, "*it had long depended in judgment,*" and the lease must have been granted some time between 13 and 18 *El.*

[1] This, too, must have been mentioned on the first argument.

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minable upon three lives, was wholly void. There is also much learning collected in the arguments on the subject of concurrent leases; though on that point the court gave no decision, the other objection being sufficient. In *Doe* v. *Calvert*, 2 *East.* 376. the doctrine of Lord *Mansfield*, that a lease to commence in *præsenti*, granted during the subsistence *of a former*, is good (under a power to grant leases in possession) as a concurrent lease, was confirmed by the opinion of the court. The principal decision there being, that a lease, executed on the 29th of *March*, *habendum* from the 13th of *February* preceding as to the arable land, and from the 5th of *April next* as to the pasture, was void under a power to lease in possession; although the several periods of entering upon the land were according to the custom of the country, and the lessee was in possession as tenant from year to year under such a holding, and had been so under the testatrix who created the power.

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point; powers are now a common modification of property in land, and, as such, are to be carried into effect according to the intention of those who create them. There is no ground or reason of equity or policy, between the tenant for life, and the remainder-man, for leaning on either side. It is apparent, from the statutes of 32 *Hen.* 8. *c.* 28. and 13 *Eliz. c.* 10. that the legislature *meant* to confine the authority to let, to lands which had been *formerly* letten, and were capable of producing profit. This is the true construction, if not from express words used, yet by necessary implication. In the case of *Bagot* v. *Oughton*, which has been much relied on, the nature of the thing shewed that the power could not be meant to extend to letting the ancient manor-house at all; much less to letting it without reserving any rent. In a *family settlement* of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly *excludes* the mansion-house, and lands about it, never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion-house. The words, in such a case, shew, that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life: he has the occupation of what was always occupied, and the rent of what was always let. We all, therefore, agree, as to the rectitude of the decision in *Bagot* v. *Oughton*. The nature of the thing spoke the intent, as forcibly as the most direct words could have done. It was demonstration. But where no intent appears, where nothing arises from the nature of the thing, the rule laid down by Lord HOLT, in the case of *Winter* v. *Loveday*, as reported in *Carthew*, applies, *viz.* "that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification (a)." So, in *Cumberford's* case, the reasoning was, that, the power being to let *all*, it would go in destruction of the power to restrain the tenant for life from letting part because it had not been let before; and it was there observed, that the case did not resemble leases under 32 *Hen.* 8. and 13 *Eliz.* *Walker* v. *Wakeman*, is another case equally strong. Thus stand the authorities. Now, to apply them to the present case. The power

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(a) Carth. 429.

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power is express[F 4] to demise the manors and fisheries. They are particularly mentioned in the settlement [☞], and the power goes to the whole. They pay, under this lease, as great a yearly rent, as at the time of the settlement, for they paid nothing then. The *words*, therefore, are complied with, and this objection could only stand upon *intent*. But we think no such intent appears: The manors are nominal,—of no value,—no object of yearly income. The fishery only [575] worth 15*s*. a year. They are convenient to the lessee, living on the land, and of no use to the remainder-man. The right of shooting and fishing is reserved to him. For my own part, I think the intent was, to give leave to demise all, reserving as much rent, in the whole, as had been paid before; and, in fact, £30 more has been reserved. 3. The third objection, as to the covenants, was not much relied on, and does not require much consideration. The power makes no mention of covenants. The ground, therefore, must be, that the present covenants are a fraud on the power, by lessening the value of the reservation, but, on considering them fully, it appears, that what is thrown on the landlord is compensated by what is paid by the tenant. She is to pay half the land-tax. As to the church-dues, the covenant seems to be collateral, and not to go with the land, nor to bind the remainder-man; resembling a covenant for quiet enjoyment. But, if it did go with the land, there is no pretence of fraud on the power. The £30 is *bonâ fide* reserved as an encreased rent. What is stipulated with regard to tithes is of no consequence, since none are payable. Upon the whole, we are all of opinion, that there is no ground for a new trial.

The rule discharged.

[☞] That was undoubtedly the case, though, to avoid prolixity, I did not, in stating the case, set forth the words of the settlement, preceding the power.

[F 4] *Semb.* that this is a better ground than the *intent* argued upon before as distinguishing this case from *Bagot* v. *Oughton*, see *Doe* v. *Calvert*, *supra*, *cit*.

1781.

BERNARDI *against* MOTTEUX.

Saturday, 27th Jan.

On an action on a policy of insurance, a condemnation by a foreign court of admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground [F 1].

INSURANCE of freight and goods, upon the ship the *Jane*, (or *Joanna*), at and from *Venice* to *London*, "*warranted neutral ship and neutral property.*" The cause was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court, on a case, which stated as follows:

That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence, on the trial, that the property of the ship and the property of the cargo were *neutral*, and that the papers belonging to the ship *fell overboard by accident*, after she was brought to, by the *French* frigate; but the defendant objected to such evidence being received, and produced, as the ground of his objection, the sentence of the condemnation of the ship in the *French* Admiralty Court, which was read, and is as follows:

" ALMERIA. } *Louis Jean Marie De Bourbon*, Duke
" *The Joanna.* } *De Penthievre*, Admiral of *France*.—
" Seen by us, *The Procés Verbal* made on board the snow
" *Joanna*, taken by the king's frigate *La Magicienne*, commanded by Mr. *De Boades*, dated the 2d of *December* last.
" Signed, *Saint Owey* steward, *Bouret*, *Dominico Zané*.—
" Seen by the captain commander. Signed *Boades*:—Pur-
" porting, that, the said 2d of *December* last, at five o'clock
" in

[576]

[F 1] See *Baring* v. *Clagett*, 3 *B. & P.* 201, where the adjudication was simply, that the ship had been duly and justly captured; and a principal ground stated for it, that the papers had been thrown into the sea; yet, from other parts of the sentence, and chiefly from the title, "Condemnation of " the *English* ship M.V." it was collected that the ground of the adjudication was, the ship being enemy's property, and not the infringement of some positive regulations of the foreign country, and the court held such sentence conclusive evidence against a warranty of neutrality. See the judgment given by Lord *Alvanley*, in which the principles and authorities are fully detailed. See also the great case of *Lothian* v. *Henderson*, 3 *B. & P.* 499, in the house of lords; where all the judges concurred in holding that a foreign sentence adjudging a ship, for whatever cause, to be enemies property, was conclusive against its neutrality: and this case was referred to as a leading authority.

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"in the evening, his said majesty's frigate *La Magicienne*, "commanded by the said captain *De Boades*, being ten "leagues east of *Cap des Moulins*, having discovered a snow "steering south south-west, the wind south-west, and having "come up with her, and stopt her, *under Venetian colours*, "after an hour's chace, the said Mr. *De Boades* ordered the "captain to bring on board his muster-roll, passport, and "bills of loading; with which order the captain did not rea-"dily comply, under a pretence that the sea was rough, and "that his long boat was leaky; but, being at last obliged to "comply, upon threats being made of firing on him, and be-"ing come on board, he declared, *that, in getting up the* "*ship's side, the box containing his muster-roll, his patents* "*and passport, had fallen from his pocket into the sea*, and "only shewed his bills of loading, by which they found the "said snow the *Joanna*, of 14 men, including officers, com-"manded by *Dominico Zané*, of *Venice*, *sailed from Venice* "the 25th of *September*, *with a cargo* of 12 bales of silk, "dryed raisins, oil, cream of tartar, potash, and other effects "mentioned in the bills of loading by him exhibited, for the "*account of sundry persons* in *Venice*, *consigned to sundry* "*merchants in London, whither he was bound*. These *goods* "*going into an enemy's country*, and the loss of his *papers* "which *had fallen into the sea, raising suspicions*, the said "snow had been stopt, and carried by his said majesty's frigate "*La Magicienne*, to *Almeria*, where she had been put into "the hands of the consul, after the said *Saint Owey*, lieute-"nant acting as steward, and the said *Bouret*, ensign on board "the said frigate, had put their seal on the said snow, where "they found no papers, and taken on board the said ship ten "of the said snow's crew, which were replaced by six men "from on board *La Magicienne*, and three from the *Atalante*, "with a coasting pilot, who have brought the said snow into "the port of *Almeria*. *The premises considered*—We, by "virtue of the power delegated to us as aforesaid, have de-"clared, and declare, as good prize, the *ship the Joanna*, [577] "her tackle, and apparel, together with the goods of her "cargo, and do adjudge them to the captors, that, in conse-"quence of this decree, the whole be sold, (if not already "done,) in the usual manner, and the produce divided ac-"cording to the desire and ordinance of the king, made the "28th of *March*, 1778. We order, by these presents, the "*Vice-Consul* of *France* at *Almeria*, to look to the execution "of this our ordinance, and thereby authorise and command "the first bailiff or serjeant to proceed in all forms requisite "thereto.—Done at *Paris*, the 13th of *January*, 1779.

"RIGOT."

The question stated for the opinion of the court was,—Whether the said sentence was not conclusive evidence against the plaintiff's recovering in this action? If the court should think

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think it not conclusive, then a verdict to be entered for him. If they should think it conclusive, then a nonsuit to be entered.

In the course of the arguments on this case, the third article of the regulations of the marine of *France*, bearing date the 26th of *July*, 1778, and also the *procés verbal* made at the time of the capture, though not stated in the case, nor given in evidence at the trial, were so much referred to, and seemed of such weight to the court, that it will be necessary to insert them in this place.

ARRET, *For the Regulation of the Marine, &c.* 26th *July*, 1778.—ART. 3. "ALL vessels taken, of what nation "soever, either neutral, or allied, from which it is known that "*any papers* have been *thrown* into the sea, suppressed, or "abstracted, shall be declared good prize, together with their "cargoes, upon the mere proof that *some papers* have been "thrown into the sea, without any necessity of examining what "those papers were, by whom they were thrown, and even "though a sufficient quantity should remain on board to "*justify* that the ship and its cargo belonged to friends or "allies."

"PROCES VERBAL *of the Venetian snow the Joanna*, "*Captain Dominico Zané, stopt by the frigate La Magi-"cienne, the year* 1778, *the second of the month of Decem-"ber*.—AT five o'clock in the evening, the king's frigate *La* "*Magicienne*, commanded by Mr. *De Boades*, being ten "leagues to the eastward of *Cap de Moulins*, having disco-"vered a snow making her way to the south-west, the wind "at east, and having joined him, detained him under *Venetian* "colours, after an hour's chace. The said Mr. *De Boades* [578] "gave orders to the captain to bring the list of his ship's com-"pany, passport, and bills of loading, on board; with which "the captain did not willingly comply, under pretence that "the sea was very rough, and that his boat was staved; but "at last he came, upon threats being made to fire on him, and "being arrived on board, he declared, that, in getting up the "frigate's side, the box in which was contained the list of his "ship's company, his patents, and passport, had fallen from "his pocket into the sea. He could only shew his bills of "loading, by which it appeared, that the said snow named "the *Joanna*, of 14 men, officers included, commanded by "*Dominico Zané*, of *Venice*, sailed the 25th of *September*, "loaden with 12 bales of silk, dryed raisins, cream of tartar, "potashes, and other merchandize, (as expressed in the bills "of loading delivered up, and which have been put up in a "packet sealed with the king's arms,) for account of sundry "persons of *Venice*, for the address of sundry merchants of "*London*, where he was to deliver his cargo. Going into "an enemy's country, and the loss of his papers by falling "into

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"into the sea, raising suspicions, Mr. *De Boades* thought "proper to stop him, *in consequence of the third article of "the regulations of the 26th of July*, 1778, concerning the "navigation of neutral ships, and to carry him to *Almeria*, "to be left under the care of the consul, and to be detained "until the court of *France* has decided the affair.—In conse-"quence of his orders, we, the lieutenant of the ship, charged "with the accounts, and the ensign of the ship, named for "the purpose, have gone on board the snow, where we found "no papers, and caused the door of the cabin, and the "hatches, to be shut, to which we have set our seal, that no "goods may be disposed of. We have likewise ordered ten "men of the crew on our board, whom we have replaced by "six of our own men, and three from the *Atalante*, with the "named *Joseph Nicholas Thurley*, coasting pilot, to conduct "her, and secure her navigation, with express orders, not to "make any insult or misdemeanor in the said snow, under "pain of corporal punishment. Done on board. Said "*Senante*."

It was admitted, at the bar, that the sentence had been appealed from, and affirmed, but nothing new, or special, appeared in the proceedings on the appeal.

The case was twice argued; first, in *Michaelmas Term*, on *Tuesday*, the 21st of *November*, by *Wood*, for the plaintiff, [579] and *Baldwin*, for the defendant; and again, on *Friday*, the 26th of *January*, by *Dunning*, for the plaintiff, (who read the *procés verbal*, and stated, that it had not come from the parties, but had been transmitted from the *French* court of admiralty, along with the sentence and other proceedings,) and by *Lee*, for the defendant.

After this second argument, Lord MANSFIELD directed the cause to stand over, till there should be an opportunity to apply to the defendant, for his consent, that the above *arrêt*, and the *procés verbal*, should be added to the case.

This day, the defendant's counsel informed the court, that their client would not consent that the *procés verbal* should be considered as part of the case.

The arguments on the part of the plaintiff were, in effect, as follows:—The sentence of the *French* court of admiralty can only be conclusive on the point directly decided. If this sentence had expressly proceeded on the ground of the property not being neutral, the plaintiff would be bound by it; but it does not appear from the sentence, that the ship and cargo were condemned *as enemy's property*. On the contrary, it manifestly went on the papers having been wilfully *thrown into the sea*. This is a ground of condemnation by the law of nations, although the property should be neutral; and by the *arrêt* of *July*, 1778, the *French* have gone so far as to subject the ship and cargo to be condemned, if *any part* of the papers

papers have been thrown into the sea, suppressed, or abstracted, even although sufficient should remain to prove that they were neutral. The truth in this case is, that the papers fell overboard by accident, but, supposing them to have been wilfully thrown into the sea, that was not a breach of the warranty. Such an act would be fraud, misconduct, or barretry, in the master, and is, therefore, one of the risks expressly insured against. The sentence does not state that *the court* suspected the property not to be neutral; the suspicions mentioned in it are recited from the *procés verbal*, and are those of *the captain* of the frigate who made the capture. Independent of any such suspicions, there was a much better ground of condemnation, namely, the *arrét*, and it will be impossible to contend, that a condemnation under that *arrét* shall operate as conclusive evidence against the plaintiff of the property not having been neutral. One of the causes of suspicion was, that the goods were going into an enemy's country; but the merchants in *London*, to whom they were consigned, may have been merely factors, and it appears from the sentence, [580] that the consignors were *Venetians*. The ground of the sentence is *at least* ambiguous on the face of it, which is reason sufficient, why it should not conclude the plaintiff, who was ready, at the trial, with evidence to shew, that the property was neutral, and that the papers fell into the sea by accident. The sentence was founded on the *procés verbal*. Therefore, though only part of it is there recited, the whole ought to have been read at the trial, as a necessary part of the proceedings, and it should now be considered as part of the case. Thus, a decree in Chancery, which only recites so much of the proceedings as are thought necessary to be set forth to introduce the decretal part, cannot be read in evidence without the bill and answer, because ambiguities may be thereby explained, and omissions supplied [1]. If the *procés verbal* is taken as part of the case, it will shew, clearly, that the ground of the condemnation was the *arrét*.

For the defendant, it was contended, that, taking the whole sentence together, the condemnation appeared, clearly, to have been made on suspicions that the property belonged to the enemy. The words of the sentence are, "*The premises* "*considered.*" What premises, but all the circumstances before stated as the cause of the suspicions? If it had proceeded on the *arrét*, there would have been no occasion to say any thing of the suspicions. It would have been sufficient, barely to refer to the *arrét* itself, after stating as a fact, that *some* of the papers had been thrown into the sea. It is true, the sentence

[1] By this argument, and indeed throughout, the plaintiff's counsel treated the *procés verbal* as in the nature of *a libel* on which the suit had proceeded.

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tence does not, in words, declare the ship and cargo to have been condemned, as *enemy's property;* but it is not the practice to do so, and it amounts to the same effect, if *that* appears, from necessary inference, to have been the ground of the condemnation. The usual cause of condemnation, in all countries, is, that the property belonged to an enemy, and, therefore, when there has been another ground, it should be set forth. Now, in this sentence, *the court* does not even say, that they suspected, or believed, the papers to have been thrown into the sea. If they *had* said so, such an act is, in all cases, *evidence* of enemy's property, and they ought to be considered as having proceeded upon it *as evidence only,* and to have condemned the ship and goods, under the general law of nations, not under a local ordinance not referred to in the sentence.

[581]

After the first argument, Lord MANSFIELD said,—The first principles are clear, and admitted. All the world are parties to a sentence of a court of admiralty. Here, there is a *monition* published at the *Exchange,* and, in other countries, at some place of general resort, and any person interested may come in [F 2], and appeal, at any time, if there has been no *laches.* If there *has,* the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular court of appeal [☞]. It cannot be controverted, collaterally, in a civil suit. The difficulty here is, what the ground was, on which the *French* court of admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime law of all countries, throwing papers overboard is considered as a strong presumption of enemy's property, and upon that principle the *arrêt* of 1778 is founded. But, in all my experience in *England,* I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The *arrêt* is very rigid. It is difficult to find out what the ground of this sentence was. I *incline* to think, the court went upon the ground of *enemy's property,* and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and upon the whole, enough does not appear on this obscure sentence, to ascertain precisely upon what it was founded, and some

[☞] *Vide supra, Walker* v. *Witter,* 6. *n.* [☞ 1].

[F 2] Lord *Eldon,* in *Lothian* v. *Henderson,* 3 *B. & P.* 545, questions the accuracy of this statement, though he concurs in the law deduced from it, viz. the admissibility of such evidence as between assured and underwriters, as established in this and subsequent cases.

some other method ought to be taken to inquire what the ground of it was. As to whatever it *meant* to decide, we must take it as conclusive.

WILLES, and ASHHURST, *Justices*, concurred with his Lordship.

BULLER, *Justice*, said, that, to be sure, the sentence was obscure, but, taking it altogether, he did not think there was much difficulty in discovering the grounds of it. The two circumstances of the cargo being consigned to the enemy, and the *falling* of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance,—papers *falling* into the sea,—could not be a ground of condemnation. The other could raise no other suspicion, nor a presumption of any thing else, but the property being enemy's property. It follows, therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing* papers overboard, *that* would have been stated, substantively, as the ground. In the first place, lay the *arrêt* out of the case; and then wilful throwing papers overboard, is only presumptive evidence of enemy's property. Then, take the *arrêt*; still, wilful throwing overboard might have been used as evidence of enemy's property, or it might have been a substantive ground under the *arrêt*: here it is not stated as a substantive ground.

[582]

On the second argument, Lord MANSFIELD said, that, if the *procés verbal* should be agreed to be made part of the case, it would clearly explain the ambiguity of the sentence, as it set forth the ground for taking the ship to have been the *arrêt* of *July*, 1778. Without the *procés verbal*, the sentence, he said, was equivocal; it took all in; and it was difficult to say, what it went on. If the papers produced to the captor were fair, the property was neutral. But, the *procés verbal* put the ground of the sentence out of all doubt.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, also declared, that he thought the *procés verbal* must be taken as part of the proceedings, and, as that expressly referred to the *arrêt* as the ground of the capture, and the sentence was consistent with it, the sentence must be taken to have been founded on the *arrêt*. But he adhered to his former opinion, *on the case as stated without the procés verbal*, namely, that the interpretation of the sentence, taken by itself, must be, that the condemnation went on the ground of enemy's property, and was, therefore, conclusive against the plaintiff.

Lord MANSFIELD then said, if the defendant would not consent that the *procés verbal* should be made part of the case, there must be a new trial. Upon this, *Dunning* observed, that it would be hard upon the plaintiff now to grant a new trial, for that his witnesses were gone to *Venice*, and the terms

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terms on which the case was reserved for the opinion of the court were, that, if the sentence should be thought not to be conclusive, a verdict should be entered for the plaintiff.

The refusal of the defendant was signified, this day, by *Lee*, who assigned as the reason for it, that the *procés verbal* was not a proceeding in the *French* court of admiralty, but merely an account of what passed on the capture, reduced into writing, at the time. He observed, that, in the sentence, all the *procés verbal, except* the concluding part, which refers to the *arrêt* of *July*, 1778, was recited, and he thought this afforded a strong argument for inferring, that the court had purposely omitted that part of it, to shew that they did *not* condemn the ship on the ground of the *arrêt*.

Lord MANSFIELD disapproved much of the defendant's refusal, but he said he thought the justice of the case might [583] still be got at, on the ground of the ambiguity of the sentence, which did not mention a word about the property being *enemy's property*; that it was clear the *French* admiralty meant to proceed on the ground of *throwing the papers overboard*; and he agreed with the counsel for the plaintiff, that the *procés verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

BULLER, *Justice*, thought, there was weight in what had been observed by *Lee*, on the reason of omitting the concluding part of the *procés verbal*, in the sentence. Indeed it was not clear that what was now offered to be produced, was the same *procés verbal* which the sentence recites, and, if it could be supposed that the captain had made another, omitting the reference to the *arrêt* as the ground of capture, *that* could only be accounted for, by his having fouud that the capture could not be supported on that ground.

WILLES, *Justice*, thought it most manifest, that the *procés verbal*, made at the time of the capture, was that on which the sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word "*purporting*" did not require a recital of the whole, and it was not necessary for the admiralty court to set forth the captain's reasons for detaining the ship. He had all along been of opinion that the sentence was so ambiguous, that it did not appear that the cause of condemnation was, that the property was not neutral, and, therefore, had thought evidence necessary to explain it.

ASHHURST, *Justice*, concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and, on that ground, Lord MANSFIELD, and WILLES, and ASHHURST, *Justices*, declared their opinion that the *postea* ought to be delivered to the plaintiff; *Lee* still urging the danger of opening the sentences of foreign courts of admiralty, which are usually informal, and expressing his apprehensions, that

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that the consequence of this determination would be, that, in all cases of this sort, there would be controversies about the ground of the foreign sentence. On this, Lord MANSFIELD said [F 3], that this supposed inconvenience would be entirely obviated, if the foreign courts would say, in their sentences, "*condemned as enemy's property.*"

The *postea* to be delivered to the plaintiff [† 117].

[† 117] *Vide Mayne* v. *Walter*, *B. R. E.* 22 *Geo.* 3. [F 4], *Barzillay* v. *Lewes*, *B. R. T.* 22 *Geo.* 3. [F 4]. *Salucci* v. *Woodmass*, *B. R. H.* 24 *Geo.* 3. *Salucci* v. *Johnson*, *B. R. H.* 25 *Geo.* 3.

[584]

GOODTITLE *against* NORTH and Others.

Thursday, 1st Feb.

Bankruptcy is no plea in bar to an action of trespass for mesne profits.

ACTION of *trespass for mesne profits*, against several defendants: *Plea* by two of them, (husband and wife,) that the husband became a bankrupt after the cause of action accrued: General *Demurrer*.

Davenport, in support of the demurrer, contended, that the statute of 5 *Geo.* 2. *c.* 30. which gives this plea, only speaks of *debts* due before the bankruptcy, and an injury by entering the plaintiff's close cannot constitute a debt. A party cannot in any case of a *tort* liquidate his own demand for damages, and swear to it before the commissioners. It can only be ascertained by the intervention of a jury. The rent is not a sure criterion. He had known, he said, more than five years' rent given by a verdict, for only one year's possession. No debt, therefore, could have been proved, for this cause of action, under the commission, and therefore the bankruptcy was no bar.

Baldwin, for the defendants, admitted, that bankruptcy is no bar to demands for torts in general. But, here, he said, though the *form* of the action was trespass, yet the demand, in *substance*, was for a debt, *viz.* the annual value of the land, and might have been the subject of an action for use and occupation, in bar to which he insisted that the bankruptcy was most clearly pleadable.

Davenport,

[F 3] Quoted by *Lawrence*, J. in *Lothian* v. *Henderson*, *supra*, *cit.* as containing the principle of the absolute conclusiveness of foreign sentences.

[F 4] These two cases are reported in *Marshall*, on Insurance, 397-8.

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Davenport, in reply, seemed to agree, that, to an action for use and occupation, bankruptcy may be pleaded; and he said, that, in a case argued some time ago in this court, it had been decided, that a party who goes for *mesne* profits after a judgment in ejectment, may wave the trespass, and bring an action on the case for use and occupation. But he contended, that when he does not wave it, the amount of his demand, or what a jury might think him entitled to, is uncertain; many things may increase the amount of the damages, as particular circumstances of inconvenience to the plaintiff from having been kept out of possession, &c.

Lord MANSFIELD,—The *form* of the action is decisive The plaintiff goes for the whole damages occasioned by the *tort*, and when damages are uncertain, they cannot be proved under a commission of bankruptcy [☞ 1].

[585]

WILLES, *Justice*, of the same opinion.

ASHHURST, *Justice*,—The plaintiff goes for a compensation in damages, the amount of which is uncertain, and cannot be sworn to before the commissioners, but must be ascertained by a jury upon all the circumstances.

BULLER, *Justice*,—The damages here are as uncertain as in an action of assault.

Judgment for the plaintiff [† 118] [☞ 2].

[☞ 1] But if the demand is such, that the amount can be liquidated and ascertained, without the intervention of a jury, it is a debt that may be proved. *Utterson* v. *Vernon*, *B. R. H.* 30 *Geo.* 3. 3 *Term Rep.* 539.

[† 118] *Vide Johnson* v. *Spiller*, *B. R. H.* 24 *Geo.* 3. *supra*, p. 167, *col.* 2. *Note* [† 55] [F].

[☞ 2] *Vide*, also, *Gulliver* v. *Drinkwater*, *B. R. H.* 28 *Geo.* 3 2 *Term Rep.* 261.

[F] And see the second report of *Utterson* v. *Vernon*, in 4 *T. R.* 570. *Parker* v. *Norton*, 6 *T. R.* 695, and *Hammond* v. *Toulmin*, 7 *T. R.* 612, cited in the notes to *Johnson* v. *Spiller*.

1781.

Thursday, 1st Feb.

LORAINE *against* THOMLINSON.

When a ship is insured for twelve months, at the rate of so much per month, though the risk cease at the end of two months, there shall be no apportionment nor return of *premium*.

THIS was an action tried before Lord LOUGHBOROUGH, at the last assizes for the county of *Northumberland*, in which the plaintiff *declared*,—That the defendant, in consideration that the plaintiff, at his instance and request, had underwritten several policies of assurance as to certain sums of money therein subscribed against his name, on the ships, merchandizes, and other things therein respectively specified, without receiving the full *premiums* therein mentioned, undertook and promised to pay the plaintiff so much money as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to £40.—There was another count for £40 for money had and received by the defendant for the plaintiff's use.—The defendant *pleaded non assumpsit*, as to all except the sum of £3, upon which plea issue was joined; and, as to the £3 he *pleaded a tender*, and paid that sum into court. Upon the plea of tender, issue was also joined.

The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of £15, subject to the opinion of the court, whether he was entitled to recover that sum of £15, or the sum of £3 only, upon a case, which stated, in effect, as follows:

The plaintiff had underwritten £200 on a policy effected at *Newcastle*, (which was set forth *verbatim* in the case,) whereby the ship the *Chollerford* was insured, against capture by the enemy, *for twelve months*, in the coasting trade between *Leith* and the *Isle of Wight*; beginning the 13th of *March*, 1779, and ending the 13th of the same month, 1780. In the body of the policy, it was stated, "That the assurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15*s*. *per cent. per month*:" At the bottom, opposite to the plaintiff's subscription, was written, "*premium* received 16th *March*, 1779;" and, on the back, was indorsed, "*Newcastle*, 15th *March*, 1779, Mr. "*John Gaul Thomlinson*, on his ship the *Chollerford*, him- "self master, *for twelve months*, in the coasting trade, at and "between *Leith* and the *Isle of Wight*, beginning the 13th "of *March*, 1779, and ending the 12th of *March*, 1780. "Enemy only. At 15*s*. *per cent. per* month, £18." The *premium* was not paid, though expressed in the policy to have been paid, it being the usage in *Newcastle* not to pay the *premium* at the time of making the insurance, but at various times after the policies are effected, and, sometimes, not till

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twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff £3 as the *premium* for two months. The case farther stated, that one *Rogerson*, a broker, one of the witnesses for the plaintiff, swore, that at *Newcastle*, at the time when this insurance was made, the *rate of premium*, on the same voyage, and against the same risk, varied in proportion to the duration of time for which the insurance was made; that the usual rate was £1 11*s.* 6*d.* *per cent. per* month, if the insurance was for three months; £1 1*s.* *per* month, if for six months; 18*s.* *per* month, if for nine; and 15*s.* *per* month, if for twelve months. That the reason of the difference was, that, when the time was long, the ship would probably be in port for a great portion of the time; that, on similar policies, when the capture had happened within the year, the whole *premium* had been paid. The defendant's witnesses, on the contrary, swore to two or three instances like the present, where there had been an apportionment and abatement of *premium*; that, when the policy was meant to be for a year, the rate was usually computed by months, the reason for which, they believed, was, to ascertain the proportion to be returned if the risk should cease before the end of the whole time insured.

J. Scott, for the plaintiff.—*Wood*, for the defendant.

Lord MANSFIELD desired *Wood* to begin.

He contended, that this was not one entire contract for a year, but an insurance from month to month for twelve months. Even on an insurance for an entire voyage, when the assured [587] can ascertain the proportion of the *premium* allowed for that part of the voyage during which the risk ceased, there must be a return to that amount. It was so determined in *Stevenson* v. *Snow* (*a*). The court, there, laid it down, as a principle in cases of insurance, that "equity implies a condition that "the insurer shall not receive a price for running a risk, when "he in truth runs none." If the policy had been for a year, or twelve months, and the *premium* a gross sum, *the court* could not have apportioned it, because the risk, in one month, might be greater than in another; but here *the parties* have apportioned the *premium*. This distinguishes the present case from that of *Tyrie* v. *Fletcher* (*b*) [† 119], where it was held, that there could be no apportionment, because the insurance was for an entire year, and the *premium* one gross sum. The court decided that case on the ground of the contract being entire. In the present case, the insurance was the same as if there had been twelve policies, one for each month.

It

(*a*) B. R. M. 2 *Geo.* 3. 3 *Burr.* 1237. 1 *Black.* 315. 318.

(*b*) B. R. M. 18 *Geo.* 3. *Vide Ber.* *Amon* v. *Woodbridge*, *T.* 21 *Geo.* 3. *infra*, p. 781.

[† 119] Since reported, *Cowp.* 666.

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It is true, that, with regard to each month, if the risk had ceased in the midst of any of them, on the principle on which *Tyrie* v. *Fletcher* was decided, the court could not apportion the *premium* for different portions of that month. The only purpose the parties could have for mentioning the monthly proportion, both in the body of the policy, and in the indorsement, must have been to ascertain the sum to be returned in case of a capture within the year. If it had been meant to be an entire contract, the *premium* would have been fixed at £18 *per annum*, without any mention of months. The usage of the place, as proved by the defendant's witnesses, is according to the construction for which he contends.

Lord MANSFIELD told *Scott*, he had no occasion to give himself any trouble.

Lord MANSFIELD,—This is a mere question of construction, on the face of the instrument [F 1], and, therefore, parole evidence should not have been admitted to explain it. It is an insurance for twelve months, for one gross sum of £18. They have calculated this sum to be at the rate of 15*s*. *per* month. But what was to be paid down? Not 15*s*. for the first month, and so from month to month; but £18 at once. Two cases have been mentioned. *Stevenson* v. *Snow* was decided on the ground of there being *two* voyages [F 2]. *Tyrie* v. *Fletcher* is directly in point against the defendant. There are two principles in these cases; 1. If the risk has never begun, the whole *premium* is to be returned, because there was no consideration; 2. When the risk has begun, there never shall be a return, although the ship should be taken in 24 hours.

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ASHHURST, *Justice*,—The 15*s*. *per* month is only a mode of computing the gross sum.

WILLES, and BULLER, *Justices*, of the same opinion.

The *postea* to be delivered to the plaintiff [† 120].

[† 120] *Vide Meyer* v. *Gregson*, B. R. E. 24 *Geo*. 3. *Gale* v. *Mackell*, B. R. E. 25 *Geo*. 3. *Long* v. *Allan*, B. R. E. 25 *Geo*. 3. *infra*, 790, *in not*.

[F 1] See *Parr* v. *Anderson*, *cit supra*, 530, *in not*.

[F 2] So, where the voyage was from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, and the ship sailed to *Portsmouth*, and from thence with convoy, which, not being direct for *Bilboa*, she left, and was captured; the court held, that there were, in fact, two voyages and two risks; and, the latter not having commenced, the assured were entitled to a return of premium in respect thereof, to be apportioned by the jury. *Rothwell* v. *Cooke*, 1 *B*. & *P*. 172.

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Thursday, 1st Feb.

The King *against* Davie and seven Others.

The court will not grant an information against the magistrates of a borough for having disfranchised persons intitled to their freedom, although sworn to have been done to serve election purposes, if the defendants deny that motive, and swear that they thought there was a legal ground for the disfranchisement, and the ground on which the disfranchisement went has not been decided.

On the first day of last *Michaelmas Term*, *Dunning* obtained a rule to shew cause, why an information should not be filed against the defendants, for a conspiracy to elect *Davie* mayor of the borough of *Lyme Regis*, in an illegal manner, for the purpose of making certain persons without title, corporators, and, thereby, to procure a colourable majority in the corporation, and, by means of this majority, to disfranchise others, well intitled to be corporators, in order to obtain an undue influence in the election of members to serve in parliament for the borough.

On making the application, *Dunning* stated, from *affidavits*, that the persons disfranchised by the defendant had been twice before removed, and restored by *mandamus*; that the last disfranchisements were on the same grounds of objection, which had been over-ruled, on argument, upon the returns made to the *mandamuses* to restore; that the same objections applied equally to the titles of some of the defendants themselves; and that, (as the persons making the *affidavits* believed,) the defendants had acted in this illegal manner with a view to procure a colourable majority of votes in the election of the members for the borough.

On *Wednesday*, the 31st of *January*, *Bearcroft*, *Arden*, *Lawrence*, and *Erskine*, shewed cause against the rule; and produced *affidavits* of the defendants, expressly denying the corrupt motives imputed to them, and swearing that they thought they had a legal ground for the acts complained of, [589] and that the last disfranchisements were expressly with a view to have the question decided, whether non-residence is a good cause for amoving a capital burgess.

This day, the *Attorney-General*, *Lee*, *Dunning*, and *Rooke*, were heard in support of the rule.

Lord Mansfield,—This prosecution is not attempted with a view to obtain any civil recompence, or to assist the disfranchised members of the corporation in being restored, for it is acknowledged that their party have now obtained a complete victory in the borough. The application is, therefore, *ad vindictam*, and *ad vindictam* only. There are undoubtedly cases where the exercise of a discretionary authority, by a magistrate, with a corrupt motive, in order to serve election purposes, will be a ground for granting an information. If, for instance, licences are refused to publicans, as in the case from *Corfe-Castle*(a); if a rate is partially made, and

(a) *Rex* v. *Hann*, *T.* 5 *Geo.* 3. 3 *Burr.* 1716. S. P. *Rex* v. *Williams* *E.* 2 *Geo.* 3. 3 *Burr.* 1317.

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The King against Davie.

and persons corruptly left out or put on; if freemen without title are admitted; if electors are arrested coming to vote, *&c.* But, what is this charge? That persons have been admitted who the defendants swear they thought had a title, and others removed who they swear they thought had none. To grant an information in this case would imply an opinion that such a proceeding is punishable as a crime. Now, there is no instance even of an indictment for it. There is great tenderness in granting informations in matters of election. How many instances do we recollect of mayors acting as returning officers after there has been judgment of *ouster* against the mayor under whom they derived their title, as at *Wigan*, *Marlow*, *Carmarthen*, &c.? Yet no information has ever been granted in such a case. For the civil injury, when a corporator has been improperly removed, there is a specific remedy by a *mandamus*, and an action for a false return. Where a person, not intitled, intrudes, he may be removed by an information in the nature of *quo warranto*, and fined for his usurpation. If you would proceed criminally, prefer an indictment. *That* is more proper for a precedent. But how is corruption proved? For the application, the *belief* of corrupt motives is sworn to, but the defendants positively deny the motives so imputed to them. The former restorations did not go upon the merits. The question, whether non-residence is a cause for disfranchising a capital burgess, (which was the ground of the amotions complained of,) has never yet been tried. It is now clear that all the capital burgesses are of the council, yet, on the returns to the different *mandamuses*, *that* was disputed, and the contrary maintained on the part of the prosecutors; though they, being possessed of the charter, knew it to be so [† 121]. I think the rule must be discharged.

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Willes, and Ashhurst, *Justices*, of the same opinion.

Buller, *Justice*,—When corporations combine, and corruptly prostitute their office to election purposes, I agree that such a case is a proper subject for an information. But the corruption should be made out. The defendants here positively deny the particulars of the charge, and the question concerning non-residence has never yet been decided. The defendants swear they believe it to be a solid ground of amotion; that they have used every means to bring it to a determination, but hitherto without success. As *that* point is yet undetermined, I should think it would be improper to suffer an information to go.

The rule discharged.

[† 121] *Supra*, p. 182, *note* [19].

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Monday, 5th Feb.

*[591]

A person indicted for high treason is entitled to a copy of the indictment and lists of the witnesses for the crown, and of the jurymen who *are to be* returned on the panel, ten days before his arraignment. —It is high treason to attempt, by intimidation and violence, to compel the repeal of a law.—The statute of 13 *Car.* 2. *st.* 1. *c.* 5. § 2. is not repealed by 1 *W.* & *M.* *sess.* 2. *c.* 2. § 1. *art.* 5—A witness is not obliged to answer whether he is a *Roman* Catholic.—Copies of the journals of parliament are evidence.

The KING *against* *Lord GEORGE GORDON.

AN indictment for high treason having been found against Lord *George Gordon*, the *Attorney-General* moved, in the last term, (on *Saturday*, the 11th of *November*,) for a rule upon the sheriff of *Middlesex*, to deliver to the prosecutor a list of the jurymen *he intended* to return on the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner, (according to the provision of the statute of queen *Anne* (*a*),) at the same time with the copy of the indictment. He said, this seemed the only method of complying with the meaning of the statute. The words are, That a list of the witnesses that shall be produced on the trial, for proving the indictment, *and of the jury*, mentioning the names, &c. be delivered to the party *indicted*, ten days *before the trial*. This, he said, had been construed to mean, *before the arraignment* [1], and, as there is no issue till arraignment, there * can be no *jury*, strictly speaking, because no jury process can be awarded till issue joined.

The rule was granted [2].

Lord *George* was this day tried at the bar. The indictment was for levying war against the king. The manner in which the trial proceeded was this: *Norton* opened the indictment. The *Attorney-General* then stated the case, and produced the evidence for the crown; the witnesses being examined in their turns,

(*a*) 7 *Ann.* *c.* 21. § 11.

[1] By the statute of 7 *Will.* 3. *c.* 3. of which that of 7 *Ann.* is but an extension, a copy of the indictment was to be given, five days, at least, before the prisoners should be *tried*, in order to enable them to advise with counsel thereupon to *plead* and make their defence. This must have meant five days before *arraignment*, because the prisoner pleads *instanter* upon the arraignment.

[2] This provision in the statute of queen *Anne*, was not to take effect till after the death of the late Pretender; and this was the first instance in which a person indicted for high treason had been intitled to the benefit of it. The rule was drawn up in the following words:

MIDDLESEX. The king against *George Gordon*, esq. commonly called Lord *George Gordon*. } "It is ordered that the sheriff of *Middlesex* do forthwith deliver to Mr. *Chamberlayne*, the solicitor for the prosecutor, a list of the jury *to be returned* by him, for the trial of the prisoner, mentioning the names, professions, and places of abode, of such jurors, in order that such list may be delivered to the prisoner, at the same time that the copy of the indictment is delivered to him.—On the motion of Mr. *Attorney-General*.—By the court."

Immediately

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turns, by the different counsel concerned for the prosecution, *viz.* the *Attorney-General*, the *Solicitor-General*, (*Mansfield*), *Bearcroft*, *Lee*, *Howarth*, *Dunning*, and *Norton*. *Kenyon* then opened the case on the part of the prisoner; after which, *Erskine*, his other counsel, told the court, he meant to reserve his address to the jury, till after the evidence for the prisoner had been gone through: he said there was a precedent for this, in the state trials (*a*). Lord MANSFIELD, upon this, told him, that, as far as he was concerned, he should be glad to hear him at any stage when it was most desirable to himself; and the *Attorney-General* declared, that no objection would be made on the part of the prosecution. The evidence was then produced; and *Erskine* having observed upon it, the *Solicitor-General* replied.

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The case, on the part of the prosecution, was; That the prisoner, by assembling a great multitude of people, and encouraging them to surround the two houses of parliament, and commit different acts of violence, particularly burning the *Roman* Catholic chapels, had endeavoured to compel the repeal of an act of parliament (*b*).

Lord MANSFIELD, when he began to sum up the evidence, stated to the jury, that it was the unanimous opinion of the court [F 1], that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king; and high treason. He requested that he might be corrected, if his notes should be deficient in any part, by those of the other judges, and of the jury; and he concluded by telling the jury, that if the scale should hang doubtful, and they were not fully satisfied of the prisoner's guilt, they ought to lean to the favourable side, and acquit him.

The trial lasted from eight in the morning, till a quarter after five of the morning following. The jury withdrew for some time, and then brought in a verdict of acquittal. Lord MANSFIELD, and the other judges, continued on the bench the whole of the time, till the jury retired.

Some

Immediately after this rule was pronounced, *Erskine* moved, that the prisoner might have counsel assigned to him, that *Kenyon* and himself should be assigned, and that they might have free access to him at all reasonable hours, according to the provisions of 7 *Will.* 3. *c.* 3. § 1. *Buller*, Justice, doubted whether this application ought not to be made by the prisoner himself, at the bar. the words of the statute being, "*Upon his or their request*;" but, the *Attorney-General* consenting, the motion was allowed.

(*a*) *Qu.*

(*b*) *Viz.* 18 *Geo.* 3. *c.* 60.

[F 1] *Vide East's Pleas of the Crown*, p. 72.

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Some points of law, and of evidence, arose, in the course of the trial.

1. It was contended, by the counsel for the prisoner, that the statute of 13 *Car.* 2. *st.* 1. *c.* 5.—(By which it is enacted, That not more than twenty names shall be signed to any petition, &c. to the king, or either house of parliament, for any alteration of matters established by law, in church or state, unless the contents thereof be previously approved of, in the manner therein mentioned; and that no person or persons shall repair to his majesty, or both, or either of the houses of parliament, upon pretence of delivering any petition, &c. accompanied with excessive number of people, nor, at any one time, with above the number of ten persons, on pain of incurring a penalty not exceeding £100, and three months imprisonment (*c*),)—was virtually repealed by that article in the bill of rights, which declares, "That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal (*d*)." But Lord [593] MANSFIELD, in his directions to the jury, said, he had never before heard it supposed, that the act of *Car.* 2. was repealed; and that it was the joint and clear opinion of the whole court, that the bill of rights did not mean to meddle with it at all; that neither *that*, nor any other act of parliament, had repealed it; and that it was in full force.

2. Some of the witnesses for the crown had given in evidence, that Lord *George*, in addressing the crowd, either at *Coachmakers' Hall*, or in the lobby of the house of commons, had alluded to what had passed in *Scotland*, at the time when it was in agitation to extend the benefit of the provisions of the statute of 18 *Geo.* 3. *c.* 60. to the *Roman* Catholics in that country, and had said; "The *Scotch* carried their point, by "firmness and steadiness;" "The *Scotch* had no redress, till "they pulled down mass-houses;" or, "When the *Scotch* "pulled down mass-houses, they had redress." The *Attorney-General* then offered to call witnesses to prove, that mass-houses had actually been destroyed in *Scotland*. This evidence was objected to, as not having any relation to the present enquiry, or the conduct of Lord *George*, and therefore irrelevant, and inadmissible. But the court over-ruled the objection, on the ground, that the evidence offered would shew what it was that Lord *George* had referred to, and held out as an example, and that it was matter of fact which had an actual existence.

3. A witness being asked, on the cross-examination, if he was a *Roman* Catholic, the question was objected to; and the court ruled, that he was not obliged to answer it, because if he were to say he was, his declaration would be evidence against him, and might subject him to penalties.

4. Sworn

(*c*) § 2. (*d*) 1 *W.* & *M.* *sess.* 2. *c.* 2. § 1. *art.* 5.

4. Sworn copies of certain entries in the journals of the house of commons, were produced, and read as evidence, on the part of the crown, without being objected to [3].

[3] I, therefore, presume, that sworn copies of the journals of parliament, are clearly evidence; though I have known it disputed. It is a general notion, that copies of nothing but records are admissible [☞], if the originals exist; and I remember a motion by *Dunning*, in *M.* 12 *Geo.* 3. (27 *Nov.* 1771,) for a rule on the *East India Company*, to shew cause, why they should not permit their original transfer books to be produced, on the ground that copies from them could not be read. He, on that occasion, stated the principle to be what I have just mentioned, and said there had been many nonsuits for want of producing the original journals of the house of commons. But the court denied the rule to be as he stated it, and mentioned several instances where copies of matters, not of record, are admissible; as copies of court-rolls, of parish-registers, &c. and Lord [594] MANSFIELD expressly said, that copies of the journals are evidence [† 122], and that he particularly remembered their being admitted on a trial at bar, in a cause in which he was leading counsel for the late Sir *Watkin Williams Wynne*, against *Middleton*, the sheriff of *Denbighshire*, on an action for a false return. That Mr. *Onslow*, then speaker of the house of commons, made a point with his lordship, that the copies should be offered in evidence, though nothing would have been so easy in that case as to produce the original journals. The court added, that the reason *ab inconvenienti*, for holding it not necessary to produce records, applied, with still greater force, to such public books as the transfer books of the *East India Company*: for the utmost confusion would arise, if *they* could be transported to any the most distant part of the kingdom, whenever their contents should be thought material on the trial of a cause. The rule granted was, to shew cause why copies of these entries in the transfer books, which the party meant to make use of, as relative to the matter in dispute, should not be taken, and read in evidence at the trial; the rule to be served both on the solicitor for the *Company*, and the opposite party [F 2].

The correct principle, therefore, seems

[☞] Lord *Coke* says, "The journals "of the house of commons are *re-* "*cords*. The *book of the clerk* of the "house of commons, which is *a re-* "*cord*, as it is affirmed by act of par- "liament in *anno* 6 *H.* 8. c. 16." 4 *Inst.* 23. The words of the act to which he refers, are, "Except the "same be entered of *record* in the book "of the clerk of the parliament, ap- "pointed, or to be appointed, for the "commons' house." That the *clerk's book* means the *journals*, is clear from several old entries. *Journ. h. of com.* 25th *Feb.* 1623-4 vol. 1. p. 673. col. 2. 1 *March*, 1623-4. *ib.* 676. *col.* 1. 12 *March*, 1623. *ib.* 683. *col.* 2.

[† 122] *Vide Jones* v. *Randall*, B. R. *H.* 14 *Geo.* 3. *Cowp.* 17.

[F 2] So, examined copies of the bank books are evidence of possession, transfer, &c. of stock. *Marsh* v. *Colnet*, 2 *Esp.* 665. *Bretton* v. *Cope*, *Peake*, *N. P. Rep.* 30.

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seems to be as laid down by Lord *Holt*, in a case of *Lynche* v. *Clerke*, *viz.* "That, wherever an "original *is of a public nature*, and "would be evidence if produced, an "immediate sworn copy thereof will "be evidence." 2 *Salk.* 154.

Wednesday, 7th Feb.

LE CAUX *against* EDEN.

An action will not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship *as prize*, although the ship has been acquitted.

THE defendant was captain of a letter of *marque* called the *Enterprize*, and, being on a cruize, fell in with, and took *as a prize*, a trader called the *Bee*, belonging to *Jersey*, of which one *Fainton* was captain, *Robine*, supercargo, and *Le Caux*, (the present plaintiff,) second mate. They, with others belonging to the *Bee*, were removed into the *Enterprize*, and brought to *England*; and the court of *Admiralty* restored the ship and cargo, and condemned the captor, in costs *and damages*. After this, *Fainton*, *Robine*, and *Le Caux*, brought separate actions of trespass and false imprisonment, against *Eden*; to which he pleaded *the general issue*; and they all stood in the paper of causes to be tried before Lord MANSFIELD, at the Sittings after *Michaelmas Term*, 20 *Geo.* 3. *Fainton* v. *Eden* and *Robine* v. *Eden*, by special juries, and *Le Caux* v. *Eden*, by a common jury. *Fainton* v. *Eden* came on first, on *Friday*, the 17th of *December*, 1779. The counsel for the plaintiff pressed, that the jury might be directed to assess damages upon *a case* to be made, subject to the opinion of the court. Lord MANSFIELD said, he thought the action a new attempt, which, if it succeeded, would destroy the *British* navy. If an action at law should lie, by the owners, and every man on board a ship [595] taken as prize, against the captor, and every man on board his ship, no man would dare to take a ship. He thought a doubt made, and the pendency of such a question, especially if large damages were given, would have very bad effects, and obstruct the necessary operations of the sea service; and, being clearly of opinion, that no such action had ever been sustained; that he himself had frequently ruled that such an action would not lie; and that, upon principles of law, convenience, and sound policy, and also upon the authority of precedents, such an action could not be maintained, he refused to direct the jury to make a case, or find a special verdict. The plaintiff might move for a new trial; the jury might find a special verdict, if they chose so to do; but he advised them to find for the defendant; which they did. *Robine* v. *Eden* stood next in the paper, and came on immediately after; when the counsel for the plaintiff combated the opinion Lord MANSFIELD had given in the former cause with

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LE CAUX against EDEN.

great warmth, and earnestly pressed the jury to find for the plaintiff. Lord MANSFIELD adhered to his former direction, which the jury followed, and found for the defendant. *Le Caux* v. *Eden* stood lower in the paper, and did not come on till *Wednesday*, the 22d of *December*. Lord MANSFIELD, understanding that the counsel for the plaintiff persisted strongly that the action lay, and, instead of moving for a new trial, meant to tender a bill of exceptions, told them, he would consent to a special verdict. He mentioned his opinion to the jury, and said, as to that point, it was agreed by both parties, that they should find a special verdict: therefore they were to assess damages, supposing the action to lie. The jury, who had heard what had passed in the other two causes, had probably formed a judgment of their own, and they found for the defendant. They were again told, it was agreed they should find a special verdict, and assess damages for the plaintiff, and they were sent back. At last, with great reluctance, they found one shilling damages.

The special verdict stated as follows:

"On the 29th of *October*, 1778, the plaintiff was the se-"cond mate on board a certain ship or vessel called the *Bee*, "of which *Fainton* was then master, and, as such mate, the "plaintiff on that day was proceeding *on a certain voyage*, "in the said ship, from certain parts beyond the sea, to wit, "from the harbour of *Paspibiac*, in the bay of *Châteurs*, on "the coast of *Canada*, to the island of *Jersey*. The defen-"dant was, on the same day, captain or commander of a "certain ship of war, or letter of *marque*, called the *Enter-"prize*, and was then cruizing on the high seas, and, on the "same day, attacked, and, after examining all the papers, "and documents, relating to, or in anywise respecting, the "said ship the *Bee*, her owners, cargo, and destination, "seized the said ship the *Bee*, *as a prize*, and caused the "plaintiff to be removed, together with others of the men, "out of her, to and on board the *Enterprize*, and kept and "continued him on board thereof, until her arrival in *Eng-"land*. A suit was thereupon commenced, in his majesty's "*High Court of Admiralty* of *England*, by *John Fiott*, "who claimed the said ship, called the *Bee*, and all the "goods, wares, and merchandizes, therein laden at the time "of her being so taken and seized, and, on the 4th of *March*, "1779, the right worshipful *Sir James Marriot*, &c. con-"demned the defendant, the captor, in *costs and damages*, "and referred the same to the register of the same court, "taking to his assistance two merchants, who were to make "their report thereon. The register afterwards made his re-"port as follows:

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(The report, which was set forth *in hæc verba*, contained allowances under different articles, *viz.* for the passage of

passengers,

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passengers, for the sailors' wages from the time of the capture till their arrival in *Jersey*; for their expences in the intermediate time; a particular sum to two of them who had been carried to *France*, and detained as prisoners, at so much *per* month during their stay there; for the captain's expences; for sundry ship's materials missing; for repairs to the ship; for *Robine's* expences; for the loss of part, and damage done to the rest, of the cargo, and the diminution in the produce, by the loss of the market; for demurrage; for interest on two bills of exchange; for insurance on the ship, freight, and remaining part of the cargo, from *England* to *Jersey*; for commission on the value of the ship and cargo; and for the expence of the reference).

" The said ship called the *Bee*, hath been restored to the " said *John Fiott*."

This case,--(together with rules which had been obtained for new trials, in the two other causes, on the ground of misdirection,)—was twice argued: once in last *Michaelmas* Term, on *Tuesday*, the 14th of *Nov.* by *Cowper*, for the plaintiff, and *Lawrence* for the defendant; and again, this day, by *Dunning*, for the plaintiff, and *Lee*, for the defendant.

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The substance of the arguments of the counsel, on both occasions, was as follows:

For the plaintiff,—1. It was proved by the plaintiff, that the defendant took him by force, from a situation in which he was following his lawful employment. *Primâ facie*, this was, unquestionably, a trespass and assault. Nor will the mere circumstance of its having happened at sea, make any difference; for actions are, every day, brought, and supported, for trespasses and assaults at sea. The defendant, therefore, must now insist, as he did at the trial, that he is not liable to this action, because the ship was taken *as prize*; and this, although it has been decided, by the sentence of the court of Admiralty, that she was not lawful prize, and that he was not entitled to take her. The ground of the defence must be, that on principles of policy, or adjudged cases, there is either no civil remedy for the assault and imprisonment of a person taken on board a ship seized as prize, or, if there is, that the proper and exclusive tribunal for giving redress, is the court of Admiralty, and that the plaintiff either has received, or may receive, a compensation there. The supposed reason of policy against the action, is the inconvenience to the naval service, if a captain, and all the officers and sailors, of a ship of war, were exposed to similar actions, at the suit of every sailor and passenger on board every ship seized by them as prize. This argument may, perhaps, be fit to be addressed to the legislature, but cannot operate here. It is a well known maxim, that, for every injury,

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jury, there must be a remedy. It will hardly be contended, that an action will not lie for wanton acts of cruelty and violence, exercised on the occasion of taking a ship as prize: and, if it will lie in any case, how is the line to be drawn? Besides, the argument of policy, such as it is, does not apply in the present instance; because this defendant is captain of a letter of *marque*, who acts voluntarily, for his own private profit, and that of his owners; not, as officers of the navy, under public compulsive authority. As to the other ground, that, if there is a remedy, it must not be sought in a court of common law, but in the court of Admiralty, the inconvenience will be just as great before that judicature, for the same multiplicity of suits may arise there. This inconvenience, however, is, in a great measure, imaginary, since actions will seldom be advised, or brought, unless where there has been a real and material injury, and substantial damages are likely to be recovered. But, how is the exclusive jurisdiction of the Admiralty court to be supported? and does it not rather seem that they have no cognisance of the subject-matter of this action? There cannot be produced an instance where they have taken upon them to assess damages for assaults, imprisonment, or any injury done to the person. In the case of *Rous* v. *Hassard* (a), the action was trespass for taking the ship, not for the imprisonment of any of the crew. So, in the present case, the allowance has only been for the loss of the voyage, damage to the cargo, loss of time, expences, and wages; not for being forced on board another ship, exposed, perhaps, to the dangers of war, or unhealthy climates, &c. Indeed, how can the Admiralty court attempt to estimate those personal sufferings, and assess a compensation for them, without the intervention of a jury, in whom that discretionary jurisdiction is, by the law of *England*, peculiarly vested? Had the ship been condemned as lawful prize, perhaps the sentence would have been a bar to this action, because, in that case, it would have appeared, from the sentence, that the defendant, in taking the ship, of which the imprisonment of the men is a necessary consequence, had done nothing but what he had an authority for, by his letter of *marque*. But, as the case is, he is to be considered as being in the same situation with a sheriff's officer, who arrests one man, upon process against another. Of the costs and damages actually assessed by the Admiralty court in this case, there is no part allowed to this plaintiff, nor is there any method by which he could compel a distribution, or the payment of any share or proportion to him. Is it not absurd to suppose, that, in any case, in a suit instituted by the owner of a vessel to recover her from the captor, together with his damages for the detention, the court of Admiralty should investigate

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and

(a) *Vide infra*, p. 602.

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and apportion the damage sustained by every individual in the ship, from the imprisonment?—2. If we were to suppose the exclusive jurisdiction of the Admiralty to exist, still, as the plaintiff has shewn a *primâ facie* trespass, the special matter of the capture *as prize*, ought to have been *pleaded* by the defendant, in order to oust the jurisdiction of this court, and it cannot be taken advantage of on the general issue.

The counsel for the defendant,—1. Stated this to be a case where nothing had been done but what was barely necessary for the purpose of bringing the vessel into port; in order that the regular enquiry might be made, whether she was, or was not, lawful prize. They did not deny that the taking was a trespass, for which there was a remedy, but they insisted, that it was so circumstanced as not to be conusable any where but in the court of Admiralty. What might be the case if the captors were guilty of wanton abuse, and unnecessary severity, as nothing of that sort had happened here, there was no occasion to enquire;—(though *Lee* said, he did not at all admit, that, even in such a case, an action at common law would lie.)—Compensation is due, if any injury has been suffered, but, as the original question was, "*prize* "*or no prize*," both *that* and all the necessary consequences of the capture as prize, belonged solely to the jurisdiction of the Admiralty court, and could only be enquired into there. It is as much a trespass to take a man's ship, as to take his person: Now, when goods, supposed to be enemy's goods, are found on board a neutral vessel, the goods only are liable to capture [☞ 1], yet, as it is necessary to secure the vessel in order to bring the goods into harbour for condemnation, the owner cannot maintain an action for taking the ship, although the goods should be proved to be neutral, but the Admiralty court, in such a case, would allow damages for the detention of the ship [☞ 2]. By parity of reason, why should they not for the detention of the person? To separate the question of "*prize or no prize*," and *that* concerning the incidental damages, would be to divide, between two different jurisdictions, the same entire transaction: There are many authorities which establish the position, that, where the original or principal matter is not conusable at common law, neither are the consequences; 13 *Co.* 53. *Cro. El.* 685. *Carth.* 398. 2 *Keb.* 360. 1 *Lev.* 243. 2 *Lev.* 25. *Molloy, Lib.* 1. *c.* 4. § 32. *p.* 731. *Livingston* v. *Mackenzie*, at *Guildhall*, before Lord MANSFIELD, 10 *Geo.* 3.—(*Lee* cited that case from a note of his own.)—As questions concerning prizes chiefly arise between foreigners and *British* subjects, it is highly expedient that they should

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[☞ 1] *Salucci* v. *Johnson*, *B. R. H.* 25 *Geo.* 3. [☞ 2] *Ibid.*

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should be decided according to a law, not municipal and peculiar to this country, but generally known and adopted. In almost all the treaties between us and foreign states, it is stipulated, either expressly, or by implication, that all matters relative to prizes shall be determined in the Admiralty court. There is, for instance, an express article to that effect, in the treaty of 1699, between *Great Britain* and *Denmark*, (*Art.* 35.) Another advantage arising from the jurisdiction of the Admiralty court is the expedition of the decision; for by the rules of that court a cause can hardly last beyond a month. If foreigners were obliged to sue at common law, they could very rarely remain in *England*, with their witnesses, the necessary time for the final determination of their cause. But the great convenience is, that all parties concerned may join in one libel, whereas, if the action at law could be supported, the costs alone of the numberless suits to which every individual among the captors would be exposed, would, independent of damages, be sufficient to deter every man of common prudence from entering into the service. It would certainly, with regard to privateers, and letters of *marque*, have the effect of a prohibition. It may be true that this plaintiff was not a party to the suit in the Admiralty, but he might have been, or any of the persons interested might have sued on behalf of himself and all the rest. An instance of a libel of that sort may be found in the printed appeals, in the year 1764, in the case of the ship *Le Vigilant*. Though, perhaps, no direct case can be mentioned of an assessment of damages in the Admiralty court, *eo nomine*, for the personal injury of imprisonment, yet the 6th and 7th standing interrogatories exhibited in order to ascertain the damages are so general, that any sort of personal injury might be stated in answering them. In the 4th *Institute*, 134, it is laid down, that the Admiralty has jurisdiction over "contracts, pleas, and *quereles*, upon the sea," which last expression seems to include personal trespasses; and the same doctrine seems to be recognized in 1 *Roll. Rep.* 250, and 3 *Blackst.* 106, 107.—2. With regard to *the plea*, the facts which come out, upon the plaintiff's own case, shew, that this is not a trespass at common law, and, therefore, the general issue is sufficient; the plaintiff has failed in proving his case, and ought to have submitted to a nonsuit.

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Lord MANSFIELD did not go into the argument at large, but adhered to the opinion he had so repeatedly and peremptorily given at *Nisi Prius*; and probably thought it more decent to leave the discussion of it to the other judges.

WILLES, *Justice*,—Under all the circumstances of this case, as stated in the special verdict, I am of opinion, that

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the action is not maintainable. I may perhaps go upon narrower ground than the rest of the court, but the rule I would lay down is, that, where the injury is the necessary * and natural consequence of the capture, the court of Admiralty has the sole and exclusive jurisdiction. The cases cited go to establish that principle. I must decide upon the facts as found by the verdict, which are merely, that the ship was seized as prize by the defendant, and that he caused the plaintiff, together with others of the crew, to be removed from thence into his own ship, and kept him there till their arrival in *England*. Nothing appears to have been done which could have been avoided, consistent with the seizing the ship as prize. I will not say there may not be cases where this court would have a concurrent jurisdiction; if, for instance, personal ill-treatment should be used, not the necessary effect of the capture. Suppose the ship were condemned as lawful prize, but that some of the crew had been used with unnecessary cruelty; I do not know whether, in such a case, the Admiralty would take conuzance of the injury, though it is very remarkable, that no action at law has ever been brought. However, that difficulty does not arise here. It is said, there is no jury, in the Admiralty court, to assess damages for a personal injury, but I see no reason why that court should not judge of such injuries, as well as of those which affect property. They have an adequate method of ascertaining the damages, by reference to the Register, who may call in the assistance of assessors. There is nothing in the supposed difficulty of apportioning the damages. Why may not £100 be assessed to one man, and [illegible] to another. There has been such an apportionment in this very case. If there is a remedy in the Admiralty court, *that* is sufficient; and it is certainly a great advantage, that the parties, there, can all join in one libel. It would be of the most dangerous consequence to the sea-service if such an action as this could be maintained.

Ashhurst, *Justice*,—The circumstance of no action having ever been brought is almost decisive, that it has been the general apprehension, that no such action will lie, for the occasions, in time of war, have been innumerable. The inconvenience of entertaining such causes would be intolerable; because every individual in the captured ship might bring a separate action against every man in the crew of the vessel making the capture. The case in 1 *Leviuz* goes on good and solid grounds. It is unnecessary to go into all possible cases, or to say how it would be, if unnecessary personal

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cruelty were exercised; but where the Admiralty court has jurisdiction of the original matter, it ought also to have jurisdiction of every thing necessarily incidental.

Buller, *Justice*,—' The question on this special verdict,

as it was stated by Mr. *Dunning*, is a plain broad question; namely, whether an action at common law can be maintained for an imprisonment on a capture at sea *as prize*; and, as it is of general importance, I have taken all the pains I could to look into the books.

'There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every war, such frequent opportunities for it, that it must have happened in every day's practice, or some instances, at least, must have been in the memory of those who have had long experience in *Westminster Hall*; but there is not the smallest trace of such a determination, or even *dictum*, in any court in *England*.

'An universal silence in *Westminster Hall*, on a subject which so frequently gives occasion for litigation, is a strong argument to prove that no such action can be sustained [† 125].

'But the case does not rest on negative usage only; for there are a current of authorities, from the time of Queen *Elizabeth*, to the present time, all of which agree, that the Admiralty has jurisdiction, not only of the question, "*prize* "*or not prize*," but of all its consequences: and many of them agree, that the Admiralty has *the sole and exclusive jurisdiction*, and that the courts of common law have no jurisdiction at all of such questions.

'The case most in point with the present is that of *Rous* v. *Hassard* & *è contra*, argued at the Cock-pit, on the 22d of *March*, 1749, and determined by Lord *Chief Justice* LEE, on the 2d of *April*, 1750.

'The circumstances of that case were these: *Rous*, having a letter of *marque*, on the 18th of *December*, 1741, seized a sloop called the *South Kingstown*, or *Paon*, *as prize*, and afterwards libelled against her as prize in the Admiralty court in *South Carolina*. She was claimed by a third person, as *French* property, (the war then being with *Spain*,) and the Admiralty court acquitted the ship and cargo. Then, an action of *trespass* was brought against *Rous*, in the inferior court of Common Pleas at *Newport*, in *Rhode Island*, for taking the sloop, to which he pleaded "*not guilty* [1]," and there was a verdict against him, with £8000 damages and costs. On an appeal and cross appeal to the superior court of judicature at *Newport*, the verdict and judgment in the inferior court were confirmed. Then, there was an appeal and

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[† 125] *Lutt.* § 108. 2 *Ld. Raym.* 944.

[1] "Captain *Rous*, according to "the course of pleading there, (saving "to himself all advantages of giving "any special matter in evidence,) "pleaded to issue, that he was not "guilty in manner and form as the "plaintiffs had declared." *Vide* printed Case for *Rous*.

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and cross appeal to the court of equity there, which decreed against *Rous*, with £5000 damages and costs; and, afterwards, an appeal by both parties, to the King in council. The reasons, in the printed case on the part of *Rous*, were, 1. That there was no evidence that the claimants were the true and sole owners of the sloop and cargo; 2. That, if the property had been sufficiently proved and established, no action of trespass could lie for the taking this sloop and cargo, because they were taken on the high seas as prize, and the court of Admiralty had not only the sole jurisdiction to determine, whether prize or not, but likewise to determine, whether, upon all the circumstances of the case, the captor ought to pay or be paid costs, and how much, or whether there should be any costs paid at all; and no other court can take conusance of that question; 3. That there was so probable a cause of seizure, that the court of Admiralty ought to have given *Rous* his costs, though the ship and cargo were acquitted, 4. This reason respected the *quantum* of the damages.

'I have a note of this case, as it was cited by Lord MANSFIELD, in the case of *Livingston & Welch* v. *Mackenzie*, at the Sittings in *Middlesex*, after *Trinity Term*, 1770 His Lordship, after stating the facts and proceedings, said:

"The great question was, Whether an action of trespass "would lie, for taking a ship as a prize. Lord *Chief Justice* "LEE, having called in two civilians to his assistance, de-"livered the opinion of the court, that, though, for taking a "ship on the high seas, trespass would lie at common law "yet, when it was taken *as a prize*, though taken wrongfully, "though it were acquitted, and though there were no co-"lour for the taking, the Judge of the Admiralty was judge "of the damages and costs, as well as of the principal mat-"ter; and he laid it down as law, that, if such an action "were brought in *England*, and the defendant pleaded '*not* "'*guilty*,' the plaintiff could not recover."

[604] 'Unless the distinction which has been made between injuries to property, and injuries to the person, can be supported, such an authority, uncontradicted by any case, or *dictum*, repeatedly recognized at *Nisi Prius*, and strengthened by the negative usage of the courts of law, would, of itself, I think, be binding upon us now, and conclude against the plaintiff.

'But, if that case wanted support, there are many authorities which maintain the principle on which that determination is founded.

'The cases which are earliest in point of time, have decided, only, that the court of Admiralty *has* a jurisdiction, and not that this court has *none*; but they are founded on a principle, which, in other cases, has been extended to the exclusion of the jurisdiction of this court.

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'In 43 *Eliz.* it was resolved, "That, if goods be taken by "pirates at sea, though they are sold afterwards at land, yet "the Admiralty has cognisance thereof, for that which is in-"cident to the original matter, shall not take away the juris-"diction."

'So it was said by the court, in 1 *Vent.* 173, and it is added, "*That* is law, though there were another resolution in *Bing-*"*ley's* Case."

'In *Turner & Cary* v *Nele*, *T.* 20 *Car.* 2. 1 *Lev.* 243. 1 *Sid.* 367. (*a*), one who had letters of *marque*, in the *Dutch* war, took an *Ostender* for a *Dutch* ship, and brought her into harbour, and libelled her as a prize, and there *was a sentence that she was not a prize;* and the *Ostender* libelled in the Admiralty against the captor, for damage sustained, *by hurt the ship had received in port*, and a prohibition was prayed, because the suit was for damage done in port, for which, it was said, an action lies at common law; but the prohibition was denied, as the original was a capture at sea, and the bringing her into port, in order to have her condemned as a prize, is but a consequence of it, "*and, not only the original,* "*but the consequences, shall be tried there.*"

'In *Ridley* v. *Egglesfield*, 23 *Car.* 2. 2 *Lev.* 25, an action was brought for suing in the Admiralty, against the statutes of *Ric.* 2. & *Hen.* 4. and the declaration stated, that the plaintiff libelled there for ship and goods, supposing them taken by pirates on the high sea, and of a coming afterwards to the defendant on the high sea, whereas he purchased them on the land. The goods were contraband, being going to the *Dutch* in time of war, and taken by a *Scotch* man of war, and, on a suit by the defendant, condemned in the Admiralty court in *Scotland*, and sold to *B.* who bought them on land, and sold to the plaintiff, in *England*. All the court agreed that the original cause, being of piracy, belonged to the Admiralty, and, *though the goods were condemned* in the Admiralty in *Scotland, this did not alter the case as to the jurisdiction of the court*, but is pleadable in abatement in the Admiralty in *England*: But neither that, nor the sale on land, altered the jurisdiction, the original matter being piracy, which all comes in question again, and the sale at land is a matter consequential upon the piracy, and dependant upon it.

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'In *Rex* v. *Broom*, *B. R. H.* 9 *Will.* 3. *Carth.* 398, the same point was resolved.

'And, in 10 *Will.* 3. in the case of *Brown & Another* v. *Franklyn*, *Carth.* 474, the court not only pronounced affirmatively, for the jurisdiction of the Admiralty court, agreeably to

(*a*) There called *Turner & Cary* v. *Smith*.

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to the former cases, but also, negatively, against the jurisdiction of the courts of common-law.

'In that case, there was a motion, for a prohibition to the Admiralty, suggesting, that trespass on the case, for conversion of goods, as also the trial of the property of any goods, belonged to the King, &c. and was not to be tried before the Admiral; that, nevertheless, the defendant, being the King's Proctor, had libelled against the plaintiffs, in the Admiralty, concerning the property of a certain ship called, &c. and her cargo, &c. whereas the ship was a wreck, in the *East Indies*, and not the property of the *French* King, or any of his subjects enemies of our King, but belonged to subjects of the King of *Portugal*, who was in amity with us, and that the goods came to the hands of the plaintiffs, *on land*, in the *East Indies*. There had been a sentence in the Admiralty court, that all was prize, and, upon that sentence, this libel was founded, charging, that the goods had come to the hands of the plaintiffs, that they had embezzled them, and praying an account.

'It was insisted, for the prohibition, that it was unreasonable the plaintiffs should be concluded by the sentence upon the general libel (*a*), to which they were not parties, neither had they any notice thereof.

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'The court inclined that the plaintiffs ought to have an opportunity to be heard, and to controvert the matter of fact, and, thereupon, a day was appointed to hear a civilian upon this question, *viz.* Whether the plaintiffs, upon this libel depending against them in the court of Admiralty, might controvert the property there, against the tenor of the first sentence?

'Afterwards, Dr. *Lane*, acquainted the court, that an appeal might be received against such a general sentence for prize, and the appellants would be let in to controvert the fight, and disprove the prize; and it appeared, that, in this case, the plaintiffs had appealed.

'Wherefore, and for that the court apprehended, (as it was insisted upon, on the other side,) that "*prize or not prize*" was a matter *not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty*, the prohibition was denied.

'The next case, in order of time, was the case of *Key & Hubbard* v. *Pearse*, at the Cock-pit, in the time of Lord *Wilmington*, which was determined by Lord *Chief Justice* LEE, and whose judgment I have, in his own hand-writing, as follows:

"At a committee of council, 21st *January*, 1742, The "declaration in prohibition is: 'Whereas the statutes of "*Ric.* 2. &c. prohibit the Admiralty to take jurisdiction of "matters at land, and whereas *Key* and *Hubbard* are natives of

(*a*) *i. e.* The *first*.

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" of *Ireland*, and are merchants, and were true owners of " the ship called the *Canary Merchant*, and the goods " therein were theirs, and were possessed of the said ship, " at the city of *New-York*, eastward of the city, neverthe- " less *Pearse*, commander of the King's ship, the *Hamburgh*, within the body of the city of *New-York*, did " seize, and take out of their possession, this *Canary Merchant*—It then sets forth the libel, wherein Captain " *Pearse* libels, and sets forth the King's orders of the 11th " of *June*, 1739, to seize *Spanish* vessels; also an order of " council of the 10th of *July*, 1739, for reprisals, charging " the taking this ship on the high seas, and that it belonged " to the subjects of *Spain*, or persons inhabiting within the " territories of the King of *Spain*.—Whereas, in truth, the " ship was taken within the body of the city of *New-York*, " and not on the sea, and whereas it did not belong to the " King of *Spain*, or any of his subjects, but did belong to " the plaintiffs—And then it sets forth their plea, in the " Admiralty, as to their title to the ship and goods, as sub- " jects of *Ireland*, merchants, their being owners, and the " seizure thereof *at land*, and also the seizing of a register, " and *Mediterranean* pass, which the master had, and that " they offered to verify this plea by *affidavits*, which are set " forth.—Then charges, that the Admiralty refused to receive " this plea, and all the proceedings contrary to the prohi- " bition.

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" To this declaration, the defendant has demurred, and " the causes of demurrer are," &c.—[Here were set forth four causes of demurrer, but the fourth only was material]—" 4th *Cause*,—For that, '*prize or not prize*,' " and the matters in question, are only triable by the law " of nations, in the Admiralty, and not by the law of this " land

" The plaintiffs (protesting, &c.) have joined in de- " murrer.

" This is a question on a seizure, made pursuant to the " King's order for seizing *Spanish* ships, and the question in " this cause was, whether this was lawful prize. As this is " a question upon prize, I think the common-law court had " no right to prohibit. To prove it; in 1 *Sid.* 320, it is " said by the court, '*Inasmuch as the matter is 'prize* " *or not prize*,' no prohibition shall go;' and, in *Carth.* " 476, 10 *Will.* 3 *per cur.* '*Prize or not prize*', is a " matter *not triable at common law*, but altogether appro- " priated to the jurisdiction of the Admiralty." And that " it is so appropriated, appears strongly from the several " acts of parliament cited, (at the bar,) in every one of " which, where there is any notice taken of the legal proceed- " ings in respect of prizes, they are noticed as in the Admi-

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"ralty, and, in 6 *Ann.* c. 37. & 9 *Ann.* c. [illegible] it is plain "the legislature considered the jurisdiction to be in the "same court, viz. the Admiralty, whether the prize was "taken on the sea, in a creek, or haven, or river. The "true reason why the jurisdiction is appropriated to the "Admiralty, is, that prizes are acquisitions *jure belli*, and "*jus belli* is to be determined by the law of nations, and "not the particular municipal law of any country. Nor "have the counsel cited one instance, where a prohibition "was ever granted in a cause of prize. The *Solicitor-General* cited *Molloy*, *lib.* 1. c. 2. § 6. where that author "says, that letters of reprisal may issue, not only by the "*jus gentium & civile*, but by the ancient municipal law of "this country; and he mentioned a writ in the *Register*, 129. "But that is a writ grounded on the statute of *Magna Carta*, c. 30. which gives power to seize and detain the "persons and goods of alien merchants here, till satisfaction is made for injuries done to our merchants abroad.

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"*That* by no means proves a general power in the courts of "law, to exercise a jurisdiction in matters of prize; but "only gives power to the court of Chancery, to issue a writ "for seizing and detaining, till satisfaction is made, in the "case mentioned in the statute." Though, therefore, I do "agree that the jurisdiction of a court of Admiralty, generally, is limited to matters arising *super altum mare*, and "is, in that respect, local, yet I do not take it to be so in "case of prize; for the jurisdiction does not depend on the "locality, but the nature of the question, which is such as is "not to be tried by any rules of the common law, but by a "more general law, which is the law of nations. It is argued, that the plaintiffs in prohibition, have, by their "declaration, made a case which shews that the ship, which "has been seized, cannot be prize, and that the defendant, "by his demurrer, has confessed this. But, though it be "true that a demurrer does confess facts well alledged, I "think *that* will not intitle the plaintiffs to a prohibition; "for, if the common law court has not a jurisdiction of "the subject, no admission of parties can give it a jurisdiction. Besides, it is not confessed by the demurrer, that "this ship did not belong to persons inhabiting within the "territories or dominions of the King of *Spain*, for *that* is "not alledged. Upon the whole, I am of opinion, that "the courts of common law had no authority to intermeddle "in this case, wherein the question appears to be, whether "[illegible] prize or not; and that the Admiralty has the "[illegible] [illegible] Court of Admiralty "[illegible] the plea offered [illegible] shall do "[illegible] in any [illegible]on, the proper remedy is "by appeal."

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'The judgment of the court of law abroad, which was for the plaintiffs, was reversed [1].

'Then came the case of *Rous* v. *Hassard*, in 1750, which I have already stated, and which, as it was admitted * on the first argument of this case, has been followed by nonsuits and determinations, at *Guildhall*, which have never been objected to.

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'And lastly, the case of *Vanderwoodst and Others* v *Thompson*, tried before Mr. *Justice* GOULD, on the 13th of *May*, 1780, at *Guildhall*, and afterwards brought before the court of *Common Pleas*; which was as follows:

"It was an action of trespass, against the defendant, for "breaking and entering the plaintiff's ship, upon the high "seas, and carrying away his money and goods: There was a "second count, confining the trespass to the goods only. The "defendant pleaded '*not guilty*'

"On the trial, it was proved, that the defendant had "letters of *marque*, under which he attacked and boarded "the ship of the plaintiffs, which made some resistance; that "he found tea, gin, cannon, and small arms, on board, and "likewise some money, which was taken out of the ship, and "carried away. That the defendant carried the ship to *New-*"*castle*, where the custom-house officers seized her for hav-"ing smuggled goods on board, and that she was afterwards "condemned in the *Exchequer*. The sentence of condem-"nation was read. It was contended, for the plaintiff, that "the capture was unlawful, because the defendant did not "belong to the custom-house; and he could not justify the "seizure under the *hovering* act (*a*), as king's ships only can "seize under such circumstances.

"But Mr. *Justice* GOULD held, that, as there was reason "to suppose that the ship was a pirate, though the jury "should be satisfied she was not really so, yet the action "would not lie.

"In *Easter Term* last, there was a motion for a new trial, "which, upon consideration, was denied by the court."

'Some of these cases go only to prove, that the court of Admiralty *has* a jurisdiction on the question of "*prize or not* "*prize*," and its consequences, and, therefore, this court would not prohibit them from proceeding on such questions; and,

[1] The course of the proceeding was thus: *Pearse* having libelled in the Admiralty-court at *New-York*, and the pleas of *Key* and *Hubbard* having been refused, they obtained, from the court of *King's Bench* of that province, a writ of prohibition, and having declared in prohibition, and *Pearse* having demurred, as above stated, the court over-ruled the demurrer, upon which *Pearse* brought a writ of error before the governor and council. They affirmed the judgment, and then *Pearse* brought this appeal.

(*a*) 6 *Geo.* 1. *c.* 21. § 31.

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and, that the Admiralty court has such a jurisdiction is not now denied, on the part of the plaintiff. But others of the cases shew, not only that the Admiralty has a jurisdiction, but that this court *has none*; and that, upon the general plea, of not guilty, no action can be maintained, where the question relates to prize.

'But, if there had been no such authorities, and the question had been now to be decided for the first time, there can be no case in which that maxim "*quod inconveniens est non* "*licitum est*," which is so often reiterated by Lord *Coke*, would deserve more attention.

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'It is a very useful and a wise maxim, when applied to new or undecided points; and, in this case, the inconvenience would be intolerable, the convenience none, if such an action were sustained.

'The inconvenience would be so great, that no officer would venture to seize a ship as prize; for he must do it at the peril of his utter ruin, since, if he were mistaken, he would be liable to an infinite number of actions, the costs of which alone, supposing the damages to be universally as trivial as in the present case, no private man could discharge.

'The convenience would be none, because, by one suit in the Admiralty court, each individual is intitled to recover a full recompence for the injury he may have sustained.

'The plaintiff is not, (as was contended by his counsel,) at the mercy of the owner, for he might institute a suit himself, or he might make himself personally a party in the suit commenced by the owner, or captor, and, in that suit, would be intitled to recover, not only for damage done to his cloaths or property, but for personal injuries to himself; some instances of which I have been favoured with from that court. And, in this case, the Admiralty have made allowance for the wages, provisions, and expences, of every man on board; which, for any thing that appears to the contrary on this record, is the measure of the real damages sustained.

'I agree with the counsel for the plaintiff, that, if it be clear upon principles, or judicial authorities, that an action may be maintained, the inconvenience will not avail; the court must pronounce according to the law, as they find it, and parliament alone can relieve.

'But no such principle, or authority, has been produced at the bar. The authorities are the other way, and so, also, is the principle; for the principle is, that the question "*prize* "*or not prize*," and the consequences of it, are conusable solely in the Admiralty court, the true reason of which is, that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country.

'The

'The counsel for the plaintiff have endeavoured to distinguish the present case from the case of an action brought immediately after the seizure of the ship, because there has been a sentence of acquittal in the Admiralty court, which is conclusive, that the ship was not lawful prize.

'Of that I will take more particular notice presently; but I will first examine more minutely what is the ground of the decision, at the Cockpit, in *Rous* v. *Hassard*, as that may afford an answer to the objection made, that, at all events, the matter should have been *specially pleaded;* which was an objection, that, for a long time, had great weight in my mind.

'The ground of that decision was, that the capture, as prize, was not a trespass at common law; for Lord *Chief Justice* LEE said, that, on *not guilty*, the plaintiff could not recover in *England*.

'But if, as insisted for the plaintiff, the capture had been, *primâ facie*, a trespass at common law, it would have been incumbent on the defendant to have pleaded specially, that he seized the ship as prize, and what was the cause, or ground, of seizure.

'This shews, that the courts have not a concurrent jurisdiction, for, if that were the case, the special matter must have been pleaded.

'The case before Mr. *Justice* GOULD was upon a plea of *not guilty*, and founded upon the same principle.

'It is true, that none of the cases which I have mentioned, were founded on *injuries to the person*, but were all for damage done to the ship, or to the cargo, or goods on board. But *that*, I think, makes no difference, for the question must be the same in an action of false imprisonment, as it is in an action of trespass for taking away the goods, or the ship; and the party injured is as much entitled to a satisfaction, in the one case, as in the other, in the Admiralty court. But, if there be any difference, that difference will operate in favour of the defendant, for a confinement under a capture is distinguishable from the common case of a false imprisonment.

'In the case of a capture, there is no distinct substantive act of imprisonment. It is only a necessary and unavoidable consequence of the capture. The captors do not mean to confine the captured longer than they are forced to do so, for the purpose of securing their supposed prize. They cannot throw them all overboard, and they cannot secure the ship and cargo, without imposing some restraint on the men; but the moment they get to a shore, they are as willing to get rid of the men, as the men themselves can be to go.

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'It was admitted, on the first argument, That the question "*prize or not prize*," is a question solely and exclusively to be

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determined in the Admiralty court. But then it was contended, that, after a sentence in that court declaring the ship to be no prize, an action might be maintained.

'But, in such actions as the present, the principal question must be, "*prize or not prize;*" for, if the ship be a lawful prize, it is not a false imprisonment; and that is a question which we cannot decide.

'The question of "*prize or not prize,*" must still arise, notwithstanding the acquittal in the Admiralty, though it is true that the sentence in that court is conclusive on the question. But it is evidence of a thing which this court cannot enquire into; and that is the ground of the decision in 2 *Lev.* 25, for, though there had been a sentence of condemnation in that case, and the goods were afterwards sold on land, yet the court refused to grant a prohibition, *because the original cause, being of piracy, must all come in question again,* and they held that the sentence did not alter the case.

'In the case in *Carth.* 474, and the later cases which I have mentioned in which there had been sentences of acquittal, the question of prize was as much at rest as it could be in the present case; but, notwithstanding *that,* the courts have always said, that the subsequent matter was not triable at common law, but altogether appropriated to the sole jurisdiction of the Admiralty. Besides this, if the original taking be not a trespass cognizable at common law, the sentence of the Admiralty court cannot give a jurisdiction to this court, which it had not before.

'That sentence does not alter the nature of the original taking. It was still a seizure as prize; which the common law does not take notice of, as a trespass; and the sentence cannot make that a trespass, which was not so at the time when the fact was committed.

'Upon the whole, as the plaintiff has had, or may have, a remedy elsewhere, as there is no case in which it has ever been holden, that such an action can be maintained, and it would be attended with great mischief and inconvenience if it [613] could be maintained, and, as there are several authorities which say, the action will not lie, I am of opinion that there must be judgment for the defendant.'

Lord MANSFIELD declared his assent to every thing BULLER, *Justice,* had said.

Judgment for the defendant.

The two rules for new trials were afterwards discharged, no writ of error having been brought in this case[1].

[1] The foundation and nature of the prize jurisdiction in the court of Admiralty, having been explained by Lord *Mansfield,* in a very elaborate argument, when he delivered the opinion of the court in the case of *Lindo v. Rodney*

v. *Rodney and Another*, and the subject being connected with this case of *Le Caux* v. *Eden*, I have inserted what his lordship said on that occasio[illegible], in this place, though the decisior was posterior, in point of time, to the period to which, for the present, I mean to confine these reports.

In *Michaelmas Term*, 22 *Geo.* 3. the rule to shew cause, why there should not be a prohibition, had been granted; and, in *Hilary Term*, 22 *Geo.* 3. (on *Friday*, the [illegible], and *Saturday*, the 26th, of *January*,) the case was argued at the bar, by Dr *Wynne*, king's advocate, Dr *Scott*, the *Attorney-General*, and *Dunning*, against,—and *Wilson*, *Wood* [illegible], *Erskine*, and *S. Heywood* [illegible] of, the application.

On *Monday*, the [illegible] Lord *Mansfield* del[illegible] of the court, [illegible]

Lord [illegible]

[illegible]

[illegible] Majesty's [illegible] under the command of Admiral *Rodney*, and General *Vaughan*, [illegible] island of [illegible] *Eustatius*, and its dependencies, upon the surrender of the said island of *St. Eustatius*, and its dependencies, on or about the 3d of *February* last; and citing all persons to shew cause, why they should not be pronounced to have belonged, at the time of the capture and seizure, to our enemies, and as goods of enemies, or otherwise liable to confiscation, be adjudged, and condemned, as good and lawful prize.

'*Elias Lindo* claims part of these goods, as belonging to him, a *British* subject, and, as to them, prays a prohibition; and, by his suggestion, among other things, he avers;

'That Sir *George Rodney* and General *Vaughan*, upon the 3d of *February*, in a hostile manner, seized upon, and took possession of, the island of *St. Eustatius*, with every thing whatsoever therein being, (open hostilities then subsisting between the king and the states,) and that the goods claimed were taken *upon land*, in the said island of *St. Eustatius*.

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'The ground upon which the prohibition is prayed, is, *that the goods were taken upon land* [illegible] upon the face of the [illegible] averred by the suggestion.

'The only question then is, Whether the goods being taken on land, though in consequence of a surrender to ships at sea, exclude the only prize jurisdiction known in this kingdom?'

[illegible] to an [illegible] of this jurisdiction [illegible] by the Judge of the [illegible] of every other [illegible] land, except upon [illegible]

[illegible] being made, I [illegible] search to be made [illegible] the Admiralty, especially during the reign of Queen *Elizabeth*. I also got a search made myself. And one of the registers informed [illegible] in court, during the argument, that there are no [illegible] books farther back than 16[illegible], no sentences farther back than 1648.

'The register has not been able to search farther back than 1690. The prior records are in confusion, illegible; and no index.

'It appears that this jurisdiction in matters of prize, (whether it be coeval with the court of Admiralty, or, which is much more probable, of a later institution, beyond the time of memory,) though exercised by the same person, is quite distinct.

'He is appointed Judge [614] of the Admiralty by a commission under the great seal, which enumerates

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enumerates particularly, as well as generally, every object of his jurisdiction; but not a word of prize.

'To constitute *that* authority, or to call it forth, in every war, a commission under the great seal issues to the Lord High Admiral, to will and require the court of Admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are hereby authorized and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations.

'A warrant issues to the judge accordingly.

'The monition, and other proceedings, are in his name, with all his titles of office, rank, and degree; adding, emphatically, as the authority under which he acts, the following words; "And also to hear and determine all and all manner of causes, "and complaints, as to ships and "goods seized and taken as prize, specially constituted and appointed."

'The court of Admiralty is called the *Instance* court; the other the *Prize* court.

'The manner of proceeding is totally different.

'The whole system of litigation and jurisprudence in the prize court, is peculiar to itself: it is no more like the court of Admiralty, than it is to any court in *Westminster-Hall*.

'From 8 *Eliz. c.* 5. it appears, that, in *civil and marine causes*, there were many appeals, which the statute restrains to one to the king in chancery, to be finally decided by delegates. But prize is not a civil and marine cause; and the appeal lies to commissioners, consisting of the privy council.

'A thing being done upon the high don't exclude the jurisdiction of the courts of common law. For, seizing, stopping, or taking, a ship, upon the high sea, *not as prize*, an action will lie; but for taking, *as prize*, no action will lie. The nature of the question excludes, not the locality. This was explained in the case of *Le Caux* v. *Eden*.

'The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis*, (as the books express it, and as I have often heard Dr. *Paul* quote,) if, upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against every body, giving every body a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay.

'These views cannot be answered in any court of *Westminster-Hall*, and, therefore, the courts of *Westminster-Hall* never have attempted to take cognizance of the question, "*prize or* "*not prize*;" not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject.

'As to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot; or wrongfully taken by them, contrary to military discipline. If there is any dispute, it is regulated by the commander in chief. There is no instance, in history or law, ancient or modern, of any question before any legal judicature, ever having existed about it, in this kingdom. To contend that such plunder was within the rules and jurisdiction of the prize court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom

whom it is given, and the rules by which he is judge. Therefore, the counsel have confined their argument to reprisals ashore, by a *naval* force; as least, I shall consider it as so confined, without entering into any question about booty, in a mere land war; as to which I have no light to go by, and it is not now necessary to be decided. *Neque teneo, neque dicta refello.*

'The question then is, Whether such a capture ashore, by a fleet of ships, and the land and sea forces aboard, in consequence of a previous surrender of the place, is within the jurisdiction of the court of prize.

'Two general objections have been relied upon.

[615] '1. That, though it were given and immemorially exercised, yet it cannot subsist, because contrary to the statutes of 13 and 15 *Ric.* 2. and 2 *Hen.* 4.

If there is no objection from these statutes to the existence of such a jurisdiction, that it is not given by immemorial usage, or the true construction of the commission.

'As to the first, These statutes manifestly relate to the usurpations of *the Instance court* of Admiralty, in causes *civil and marine*, to *contracts, pleas, and quarrels*, only triable at law. There is not a word in any of the statutes applicable to the *Prize court;* there was no complaint of it: not a syllable of commissions to judge of prize.

'In the subsequent altercations, in the reign of *James* I. between the Admiralty and the judges, there is not a word of prize: the Admiralty don't complain of prohibitions in prize; none had ever been granted: the judges don't complain of encroachments in matter of prize.

'The view, purport, and tendency of the statutes, is to prevent the Admiralty from trying matters triable at law. The taking a ship upon the high sea is triable at law to repair the plaintiff in damages: but a taking on the high sea, *as prize*, is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or not prize*—not only authorizes the prize court, but excludes the common law.

'These statutes don't exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action: it must be done upon the high sea.

'If done in ports, havens, or rivers, within the body of a county of the realm, the Admiralty is excluded. But the prize court has uniformly, without objection, tried all captures in ports, havens, &c. within the realm. It happens often. We all remember several cases. Ships, not knowing of hostilities, come in by mistake. Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made. They can only be condemned in the court of prize.

'What is still more extensive, foreign ports, or harbours, are not the high sea, any more than the shore, but numberless captures made there, have been condemned as prize.

'I am of opinion, that these statutes have no view, or relation to the subject of prize: consequently there arises from them no objection.

'2. The second objection is, that the jurisdiction is not given.

'I will consider this objection in three points of view.

'1. Upon the words of the commission.

'2. Upon the reason of the thing.

'3. Upon authorities and usage.

'1. As to the first; the commission certainly has in view captures by ships. Hostilities are committed by ships and the men aboard, at sea, or ashore; a fight begins; the vanquished

runs

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runs ashore; gets the goods out; is pursued ashore; and the goods are taken.

'A fort, or town, is taken by the force of ships at sea, and is ransomed; or plate, money, and valuable effects taken.

'The means this country has of annoying, and making reprisals upon an enemy, is by naval expeditions. There never was; there never will be, one, no, not a single ship, which has not a view to operations upon land, if occasion should offer. They are often the main view--Sir *George Rooke*, at *Vigo*—Admiral *Vernon*, at *Porto Bello* and *Carthagena*—Lord *Anson*, in the *South Seas*—Sir *George Pocock*, at the *Havannah*—Many last war to *Martinico*, *Guadaloupe*, and other places—Commodore *Johnston* the other day.

'In many old treaties, some of which I shall mention by and by, the usual stipulation is, that the subjects of the one prince shall do no injury or violence to the subjects of the other, by land or sea, or in fresh waters, or in port. It is not by accident, therefore, that the words of the commission are general—all manner of captures, seizures, prizes, and reprisals of all ships and goods. It don't say—upon the sea. It don't say—goods in the ship. "*Reprisals*" is the most general word that can be used.

'In causes civil and marine, to give jurisdiction to the court of Admiralty, the libel must allege the cause of suit to be done upon the high sea, and, therefore, if that had been the intention of the commission, or the rule of law, it would certainly have been so expressed in the commission.

'2. The reason of the thing requires the words should be general.

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'It is, as I have said, in the view of every ship, much more of every fleet, which sails to make reprisals, to act on shore. There is no place of note which can be attacked, where neutral or *British* subjects do not reside, or have property, or where the enemy may not colourably borrow their names.

'If it is not within the jurisdiction of the prize court, consider the consequence to the captors; to the claimants; and to the state.

'The captors are in a miserable condition indeed. The prize cannot be condemned. If granted, it cannot be shared. Every officer and sailor may be liable to actions without number. The taking cannot be disputed. To disprove the property, they can only have witnesses from abroad, who cannot be compelled to come. The grounds upon which the prize court condemns or acquits, cannot be read at law; and, in every action where the plaintiff recovers to the value of a farthing, the captor must pay the costs.

'Colourable claimants might easily ruin the captors, through their want of the means of defence.

'It would be equally mischievous to fair claimants. They could not have their property restored instantly, upon their own papers, books, and *affidavits*. They must make formal proof. And the owners or crew of a privateer all the while might be spending the effects.

'But to the state the consequences would be still more mischievous.

'No distinction can be made between *British* and neutrals. If the jurisdiction is null by the statutes, or never was given, it can no more be exercised in the case of a neutral, than in the case of a subject.'

'By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the

the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages, and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant, and subjects his property to the rules and authority of a municipal law, by which he is not bound.

'In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are thus taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.

'Mr. *Piggott* candidly said, it would be spinning very nicely, to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force.

'Would a sum paid by capitulation upon land have made it a sea or a land prize?

'*Cui bono* should all this subtlety be spun, when the reason for a jurisdiction to judge a capture at sea, and such a capture at land, is exactly the same?

'3. Authorities and immemorial usage.

'In 1498, a treaty, intitled *Confirmatio Tractatûs contra spolia maritima, & pro depredatoribus coercendis,* between *Henry* VII. and *Louis* XII. confirming one before made with *Charles* VIII. (13 *Hen.* VII. *Rymer*, vol. 12. p. 690.); and, in 1526, another between *Henry* VIII. and *Francis* I. (17 *Hen.* VIII. *Rymer*, vol. 14. p. 147.)

'They stipulate, that (before any ship goes out of port, the admiral, &c. shall take sufficient security from the owners, that the master and mariners shall keep the peace towards the subjects of the other prince; and shall do them no injury or violence by land or sea, or in fresh waters, or in any port. The mariners to take an oath, that, when they return with their ships, and spoils, if they take any, they will immediately inform the admiral, or his officers, of the port from which they sailed, of their plunder, (*præda,*) spoils, and goods, without whose decree and permission they shall not be suffered to convey them out of their ships, or to exchange, sell, or alien them.* No body to purchase, &c. from them, before the admiral, &c. have declared them to be lawful prize and capture; but, if it shall be found that the said plunder, [617] (*præda,*) was taken away from the subjects, lands, kingdoms, or dominions, of either of the said kings, the goods taken, with damages and interest, shall, without delay, be ordered to be restored to the persons who have been plundered, and the sentence to be against masters, partners, owners, and sureties.

'Either party aggrieved may appeal to the supreme council.

'These treaties demonstrate the jurisdiction of prize in the Admiralty and commissioners of appeal then, to have been pretty much as it is now. Ships of war are to give security to do no injury or violence by land or sea, or in fresh waters, or in any port. When they return with prize, they are to disclose it, if they have taken any thing *by sea or land* from the subjects of either prince. If they have taken from the subjects, *lands*, kingdoms, or dominions, of either, instant restitution to be made, with costs and damages.

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damages. If taken from *the subject*, in the land of an enemy, to be restored. If taken from *the land* of either prince, though the goods of an enemy, to be restored: it is a breach and violation of his territory. A capture of Admiral *Boscawen* upon the land and shore of the King of *Portugal* occasioned much discussion.

'It manifestly appears from these treaties, that the jurisdiction equally extended to goods taken by ships or their crews on land and at sea. They shew too, that no property vests in any goods taken at sea or on land, by a ship or her crew, till a sentence of condemnation as good and lawful prize; which continues law to this day.

'In *Goss* v. *Withers*, 2 *Burr*. 694, it is said, "That I had talked with Sir *George Lee*, who had examined the books of the court of Admiralty, and informed me, that they held the property not changed so as to bar the owner, in favour of a vendee, or recaptor, till there had been a sentence of condemnation, and that, in the reign of *Charles* II. Sir *Richard Floyd*, (the father of the late Sir *Nathaniel*,) gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been 14 weeks in the enemy's possession, because she had not been condemned. That another case, upon the same principle, against a vendee, is cited at the end of *Assieredo* v. *Cambridge*, in 1695, (*Lucas* 79,) after a long possession, two sales, and several voyages."

'In the reign of Queen *Elizabeth*, it is well known that a buccaneering war was carried on by private adventurers, and that, in the *Spanish West Indies*, considerable prize was taken on land.

'Dr. *Wynne* said, the commissions to fit out ships against the enemy, expressly authorize the persons to whom they are granted to take the enemy's goods by land as well as by sea.

'He cited one, by way of instance, in the 37th of *Elizabeth*, 1595, (*Rymer*, vol. 16. p. 2751.) A commission to *Robert Crosse*, giving full power, in hostile manner, *as well by land as sea*, to invade, take, stay, and destroy, any ships or goods of the King of *Spain*, his subjects, or adherents.

"And such ships, goods, jewels, "bullion, or any other riches as they "shall take in them, we do strictly "charge and command you to see "that they be safely preserved from "spoil, and to be brought home in "good order into our realm of *Eng*-"*land*."

'They were to seize goods by land and sea. All they seized they were to bring to *England*. No property vested till condemnation. They could only be condemned by the prize court of Admiralty. They, therefore, most certainly were so condemned, though the proceedings are lost.

'In the reign of Queen *Elizabeth*, and former reigns, many special commissions issued, to inquire into depredations by violators of treaties, and the law of nations, which are to be seen in *Rymer*. But the most ancient instrument shews a prize jurisdiction, either inherent, or by commission, in the admiral. It is a letter from *Edward* III. to the King of *Portugal*, (*Rymer*, vol. 6. p. 15.) and recites a complaint, that the admiral, before whom the goods were judicially demanded, determined, that they should not be restored, as having been taken in war.

'Since the reign of Queen *Elizabeth* no special commission appears to have issued; but the Judge of the Admiralty, either by virtue of an inherent power, or the King's commission, or both, has solely exercised the jurisdiction of prize.

'I will conclude with three propositions.

'1. That, so far back as particular cases can be traced, which is for a century,

tury, the admiralty has judged of, and condemned, goods taken on land as prize, as well as goods taken on sea.

'2. That every common-law authority to be found on the subject, allows and supports the jurisdiction.

'3. That the legislature has, in many acts of parliament, recognized and referred to it, as clear, certain, and undoubted.

'1. 15 *April*, 1692. The sentence of Sir *Charles Hedges*, Judge of the Admiralty prize court, on goods taken on the plunder of a town.

" Captain *Mann*, commander of " their Majesty's hired ships in the " *West Indies*, goes on shore with se" veral of his crew, and pillages and " plunders the inhabitants of a town, " then in the territories and domin" ions of the *French* King, and brings " off, and carries on board his ship, a " considerable quantity of goods, to " the amount of £20,000, as is sworn " by several witnesses, besides 30 ne" groes, worth £20 each. This pil" lage he keeps to himself, without " making any distribution thereof to " his followers, or crew. The ma" riners, thinking they had a right to " a share thereof, have called him to " an account in the court of prize, " and the questions which are made, " are:

" 1. Whether this court has juris" diction?

" 2. Whether the mariners have a " right to a share?

" 3. What that share shall be?

" 1. As to the jurisdiction; which " is twofold, the court of Admiralty, " and the court of Prize.

(' Here there is a long argument to shew that it may belong to the court of Admiralty, as incident to the military authority of the admiral, in time of war, upon descents, as well as at sea,—which is not material to be now stated.—He proceeds thus:)

" But go to the second ground of " jurisdiction in this case, that it is, " (as it is,) before the court of prize; " where, by the plain words of the " patent under the broad seal of *Eng*" *land*, it is evident enough, that the " court has cognizance of prize goods " taken from the *French*, as well by " land as by sea. It is, therefore, " very clear to me, that this court has " jurisdiction."

' He then proceeds upon the other two questions, as to the shares, but that is not material.

' This was followed, very soon after, by the cause which gave rise to the motion for a prohibition in 1698 (*a*).

' 1703. *Vigo* Captures under different circumstances. Many to this purport.

' *Adventure*. *Trevor*. captain. The Queen against the goods in a certain schedule annexed, taken from the enemy, at the port of *St. Mary* and *St. Vigo*, in the kingdom of *Spain*, and put on board the said ship, and there, or in the hands of the said *Trevor*, now, or lately, remaining, and against all persons in general.

' Much was undoubtedly taken on land, and all condemned.

' 10 *June*, 1745. *Peyta*. Sentence of condemnation to the King. Several purses of money, and jewels, amounting to £30,000, and upwards, taken and seized as plunder, in the town of *Peyta*, being a town in the *Spanish West Indies*, in the kingdom of *Spain*, from the enemies of the crown

(*a*) *Brown* v. *Franklyn*.

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crown of *Great Britain*, were rightly and duly taken by the officers and mariners of his Majesty's ships, (naming them, &c.)

'4 *Feb.* 1746. Plunder taken from the island of *St. Bartholomew*, and condemned in *Antigua*, *viz.* 170 negro and mulatto slaves, and divers other goods, wares, and merchandizes, seized and taken from the island of *St. Bartholomew*.

'27 *April*, 1759. *Savannah.* Taken by Sir *Hyde Parker's* fleet. Goods and effects, (specified,) taken in boats and craft, *and on shore*. Many claims and restitutions.

'27 *June*, 1759. Plunder taken at *Senegal*.

'28 *March*, 1763. *Havannah.* Upon another state of facts. The ship *Tyger*, and the effects on board, surrendered by capitulation, with the town;—a treaty *on land*.

'These cases shew, that, for a hundred years, the jurisdiction has been professedly, notoriously, and quietly exercised; which leads to the second proposition, that this exercise does not rest on acquiescence only, but

'2. That every common-law authority to be found on the subject, allows and supports the jurisdiction.

'*Brown & Burton* v. *Franklyn*, the King's Proctor, *Scacc. H.* 10 *W.* 3. *Carth.* 474. *Brown* & *Burton*, the masters of two ships belonging to the *East India Company*, took a *French* ship, and cargo, and money, upon land. They had no letters of *marque*. The King's Proctor, upon the usual monition, got a sentence of condemnation of [619] the whole, as perquisite of Admiralty, and then proceeded upon the ground of this sentence, against *Brown* & *Burton*, for an account.

'They moved for a prohibition, suggesting the statutes of 13 and 15 *Ric.* 2. and 2 *Hen.* 4. and averring that the goods and merchandizes were taken *upon land*, in the *East Indies*, and that they were no parties to the sentence, never heard, and ought not to be bound.

'The last was an objection upon the eternal principles of natural justice, but immediately removed, when the nature of the proceeding *in rem* came to be explained.

'The ground which remained, was their being taken upon land. If the court had no jurisdiction, the sentence was null and void, the subsequent proceeding was illegal, and must have been prohibited.

'But it was insisted, by the counsel against the prohibition, that *prize or no prize* was a matter not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty.

'The court concurred in this proposition, and, therefore, denied the prohibition.

'This is a judgment in point, and the attempts which have been made shew, that no ingenuity can distinguish it, and Lord *Chief Baron Comyn* draws a general conclusion and maxim of law from it:—"If a sentence be in "the Admiralty, for a ship or goods, "as prize, a prohibition does not go "upon a suggestion, that it was not "prize, *or that it was acquired upon* "*land* (a)."

'But, in 1742, there is a more solemn and more elaborate judgment, by Lord Chief Justice *Lee*, a very able, and a very strict common lawyer; *viz.* in *Key* & *Hubbard* v. *Vincent Pearse*, 31 *January*, 1742. I was counsel in it. It was argued, and could only be argued, as a mere question of law, just as if it had arisen in *Westminster Hall*, upon

(a) Com. Dig. title Admiralty, (E. 9.)

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upon a capture in the river *Thames*, within the body of a county.

'The colonies take all the common and statute law of *England*, applicable to their situation and condition. The courts of law prohibited the court of Admiralty, just as the courts of *Westminster Hall* do here.

I *had* a full note of it. But, luckily, Lord Chief Justice *Lee* having taken time to consider, he brought with him notes of the opinion he was to deliver, which notes we have in his own hand. I have also the report of the committee, and the order of counsel upon it.

'I will state to you the notes from which the Chief Justice gave his opinion, in his own hand.'

(Here his Lordship read the opinion of *Lee*, Chief Justice, *verbatim*, as it is set forth *supra*, p. 606 to 608).

'Nothing can be clearer than the principles laid down by him. The question, "*prize or no prize*," is the boundary line; and not the locality of land or sea, or port within the body of a county within the realm [F 1].

'3. That the legislature, in several acts of parliament, has recognized and referred to this jurisdiction over goods taken on land as prize.

'The prize act of the 17th (*b*) and 29th (*c*) of *George* II. contain a clause, that the Lords of the Admiralty shall grant a commission, at the request of the owner, to the captain of any ship, "for attacking or taking, with such "ship, or with the crew "thereof, any place or "fortress *upon the land*, "or any ship or goods "belonging to, or pos- "sessed by, &c."

'The statute of the 19th of *George* III. (*d*), meaning to express the same thing, has used more words to effectuate the grant of the property to privateers, but takes the jurisdiction for clear and certain.

'Subsequent acts follow this.

'Upon these authorities there can be no doubt. We, none of us, ever had any.

'If the question *had* been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the state, if goods taken upon land by ships should not be within the prize jurisdiction.

'The merits are no part of this question. If the captors have done wrong, in substance, or in manner, the Judge of Admiralty, and, if he err, the Lords of Appeal, have full power to make ample reparation. They give satisfaction [620] even to an enemy prisoner, who is illiberally plundered, or personally ill treated.

'As we are all clearly of the opinion I deliver, we ought not to contribute to the injustice and mischief which may be occasioned to many persons,

(*b*) 17 *Geo.* 2. *c.* 34. § 2.
(*c*) 29 *Geo* 2. *c.* 34. § 2.
(*d*) 19 *Geo.* 3. *c.* 67. § 2.

[F 1] So in *Menetone* v. *Gibbons*, 3 *T. R.* 267, it was held, on the authority of this case, that the Admiralty court has jurisdiction to proceed against a ship, and condemn her to be sold, upon an hypothecation bond, though made on *land*: and that it made no difference that the instrument was under *seal*; any more than, in the case of *Brymer* v. *Atkins*, (*infrà. cit.*) *a recognizance* entered into by the parties in a vice-admiralty court, to abide the event of an appeal (which they held only to operate in that court as a *stipulation*) was an objection to the jurisdiction given to the court of appeal.

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Le Caux against Eden.

persons, from giving liberty to declare in prohibition, and the parties know, they are not finally barred by our judgment. They may apply for a prohibition to every court in *Westminster-Hall*.

'Therefore, we are all of opinion, that the rule should be discharged.'

No motion has been made for a prohibition, in any other court; but an action, (*viz. Mitchell and another* v. *Rodney and another*,) in which the same question arises, was tried before Lord *Mansfield*, at the Sittings after *Hilary Term*, 22 *Geo.* 3. and a special verdict found, upon which judgment passed in *B. R.* for the defendants, in the ensuing term, without argument, the opinion of the court being already known; and a writ of error upon that judgment is now depending in the house of lords [† 126] [F 2].

[† 126] On the 24th of *November*, 1783, the judgment of the court below was affirmed.

[F 2] The prize court has not only exclusive jurisdiction of the question of prize or no prize, but also of the question who were the captors; and it has a right by its process to place the property captured in the hands of those parties whom it has decided to have an interest in the capture, as, in that instance, the army and navy jointly. And even if that court misconstrues an act of parliament on a matter within its jurisdiction, a prohibition will not lie. *Lord Camden* v. *Home, in error*. 4 *T. R.* 382. So, if the prize court decide goods to be enemies' property, and the ship in which they were taken to be neutral, and decree the former to the captors, and the latter to the claimant, it has an exclusive jurisdiction: also to decree what shall be paid to the latter for the *freight* which he has lost. And it may proceed for that purpose against parties having the produce in their hands; notwithstanding the goods have been delivered to the captors, and the statute 19 *G.* 3. *c.* 67. *s.* 2. vests prize goods in them. *Smart* v. *Wolf*, 3 *T. R.* 323. In this and the preceding case, these of *Le Caux* v. *Eden*, and *Lindo* v. *Rodney*, are fully confirmed, and considered as fundamental decisions on this subject; which is also fully discussed and illustrated by the arguments and judgments there given. On the principle of these decisions also it is settled, that captors have an insurable interest; being "liable to "be called to account in the court of "Admiralty, where they may be amerc-"ed in damages and costs," *per* Lord *Kenyon*, *Boehm* v. *Bell*, 8 *T. R.* 154. See also *Le Cras* v. *Hughes*, *Marshall*, *Ins.* 108. See also *Willis* v. *Commissioners of Appeal in Prize Causes*, 5 *East*. 22, and *Brymer* v. *Atkins*, 1 *H. Bl.* 164, to which the same observations apply. In the former of these cases it was decided, that the commissioners had power (upon their original jurisdiction independent of the prize acts) to charge the agent for the captor, with *interest* upon the proceeds, after a decree of restitution. In the latter it was held, that where a prize court is authorized, by statute, to give the full value of ship, &c. to the appellant, it is not bound to interpret those words by any definite measure, (as by the price at the port to which it was carried,) but has a discretionary power to declare the full value, and also to enforce payment of it from the sureties.

1781.

Friday, 9th February.

LUXTON *against* ROBINSON.

In an action upon an agreement to deliver possession for certain considerations, subject to a forfeiture, on failure, by either party, the person who was to deliver possession cannot sue for the forfeiture, without shewing in his declaration a possessory title in himself.

ASSUMPSIT, on an agreement, by which the defendant was to take, of the plaintiff, certain premises, known by the name, &c. and the goods and fixtures, which should appear to be the property of the plaintiff, by a fair appraisement, by two appraisers, or their umpire, or else to forfeit a deposit of five guineas, and, if either should fail in his part of the agreement, that he should pay £10 to the other, exclusive of the deposit; the defendant to take possession on a day specified. The plaintiff averred, that, on the day, he was ready and willing to deliver to the defendant the said premises, and such goods and fixtures as should appear to be the property of the plaintiff, *at such appraisement as in the said agreement mentioned*, yet the defendant did not then, nor at any other time, accept and take of the plaintiff, the said premises, but wholly refused so to do, by reason whereof he became liable to pay the said sum of £10, exclusive of the deposit. *Special Demurrer*; for that it does not appear; 1. That the plaintiff had any interest in the said premises, at the time of making the agreement; nor, 2. That he ever requested the defendant to take the said premises, and such of the said goods, &c.; nor, 3. That the said goods and fixtures were ever appraised in any manner whatsoever.

In support of the declaration, it was said, that, when a party declares on a demise, there is no occasion to shew an interest; if the defendant means to call *that* in question, he ought to plead *nil habuit in tenementis*, and then the plaintiff must shew a title in his replication. Besides, in this case, it was not necessary that the plaintiff should have an interest in the premises, for nothing was to be paid but for the goods and fixtures. As to the appraisement, it was enough to aver, that he was ready and willing. He could not have an actual appraisement without the concurrence of the defendant; for, from the nature of the contract, one appraiser must have been named by each.

[621]

Wood, for the plaintiff.—*Runnington*, for the defendant.

BULLER, *Justice*,—This is not like a demise by deed. Here, the plaintiff was to *deliver possession*, and, therefore, he ought to have shewn, that he had a right so to do. With regard to the appraisement, if each was to appoint one, he should have shewn, that he had appointed one.

Wood had leave to amend, on payment of costs.

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Saturday, 20th Feb.

The KING *against* the INHABITANTS of CORHAMPTON.

When the title of the rate is—so much in the pound,—and the pauper's name is inserted in the rate, and also his yearly rent, though nothing is written against his name in the column of *sums assessed*, this is a sufficient *rating* for the purpose of gaining a settlement.

THE court of quarter sessions for the county of *Surry*, confirmed an order of two justices, for removing the wife and children of one *Richard Goodiff*, from the parish of *Croydon*, to the parish of *Corhampton*, subject to the opinion of this court, on the following facts:

Richard Goodiff was originally settled at *Corhampton*. In 1769 he came to *Croydon*, and there rented a house at £4. 10*s.* *per annum*. On the 10th of *June*, 1773, the overseers of the poor of *Croydon* made a rate of 2*s.* in the pound, in this form, *viz.*

Rent.		Occupier's Names.	Sums Assessed.
£10.		A. B.	£1.
4.	Q. C.	*Richard Goodiff.*	

On the 22d of *June*, one of the overseers demanded of *Goodiff* 8s. for the rate, declaring he was assessed in that sum for the relief of the poor. *Goodiff* objected, alledging he was not a parishioner. The overseer opened the rate-book, and shewed him his name therein, and threatened to distrain for the 8*s.* if he did not pay it. *Goodiff*, on this, paid the money directly. In the afternoon of the same day, the overseer returned, with the vestry clerk, and offered to return the money, saying he had taken it by mistake. *Goodiff* refused to receive it. The overseer, however, left it, and went away, on which *Goodiff* threw the money after him.

[622]

It was admitted, that Q. C. meant *Quære Certificate.*

Mingay, in support of the order, said, he admitted, that in all the cases where the question had turned upon the way in which the person meant to be rated was described, the court had inclined to a favourable construction, but that, here, there was no rating. There was no sum put against *Goodiff's* name. The parish knew he occupied the house, but they never intended to rate him. The mistake of the overseer, (and corrected so soon,) in supposing him rated when he was

not,

not, could not be binding on the parish. He cited *Rex* v. *Warblington* (a).

Kirby, serjeant, and *Palmer*, on the other side, insisted, that the omission of a particular sum in the column of "*sums assessed*," was supplied by the style of the rate, being a rate of 2*s*. *in the pound*, coupled with the entry of £4 opposite to *Goodiff*'s name, in the column of *rent*. The case of *Rex* v. *Warblington* was very different in its circumstances from this, and went upon fraud committed by the pauper.

Lord Mansfield, (stopping *Palmer*,)—The case cited does not apply. The payment, there, was not till a year after it should have been made, and the overseer was induced to receive it by a misrepresentation. There is no question here. The title of the rate is "*Two shillings in the pound*," and, in the column of *rent*, *Goodiff*'s rent is £4. This fixes his proportion of the rate. For what purpose was his name inserted, if not to rate him? Then, has he paid? Yes; and against his will; and the overseer shall not have it in his power to say, upon reconsidering the matter, "I "have thought better of it, and you shall not gain a settle-"ment."

Both the orders quashed [† 127].

(a) *T.* 14 *Geo.* 3. *Burr. Settl. Ca.* No. 245.

[† 127] *Vide Rex* v. *Heckmondwicke, supra*, p. 564. and the cases there cited, *note* [† 65].

[623]

Yates *against* Freckleton.

Monday, 12th Feb.

Payment of the debt, to an agent employed to sue the defendant by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney himself is.

ACTION on a note of hand. The plaintiff's attorney, in town, had sent the note to *Fox*, an attorney, at *Coventry*, where the defendant resided, to present it for payment; and, by the letter inclosing it, directed him, if payment should be refused, to return it immediately to him; adding, that, in that event, he would send down a writ to him, to arrest the defendant. *Fox* having accordingly presented the note, and payment being refused, he wrote to the attorney in town, to inform him of it, and a writ was sent to him, upon which he arrested the defendant, who gave bail to the sheriff. *Fox*, afterwards, got an assignment of the bail-bond, to the plaintiff, and, some time afterwards, the defendant paid the debt, and all the costs then incurred, to *Fox*, who gave him a receipt. After this, the bail were served with process and notice of declarations on the bail-bond, *Fox* not having paid the money over to the plaintiff, or his attorney, and the attorney having

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having employed another agent, but without giving any notice of the change to the defendant. The letter to *Fox*, accompanying the note, had not been shewn to the defendant, before he paid the money; but, when the process on the bail-bond had been served by the new agent, *Fox* produced it to the defendant, to convince him that he was duly authorized to receive the money.

On *Thursday*, the 1st of *February*, *Douglas* obtained a rule for the plaintiff to shew cause, why the proceedings on the bail-bond, subsequent to the payment of the debt and costs by the defendant, should not be set aside, with costs; and all further proceedings in the mean time staid. On *Saturday*, the 10th of *February*, this rule was enlarged, with the addition, that *Fox*, on notice to be given him of the rule, should answer the several matters in the *affidavits*.

It was then, and this day, urged, in support of the rule, that payment to an agent is the same thing as payment to the original attorney; and that the plaintiff's attorney ought not to have changed his agent, without giving notice to the defendant. That, besides, the letter, here, was to be considered as a special authority to receive the money, and, although it had not

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been shewn to the defendant before the payment, yet the plaintiff, who had thereby, (through his attorney,) vested the power in *Fox*, ought not to be suffered to avail himself of that circumstance.

Dunning, for the plaintiff.—*Caldecot*, for *Fox*.

The court were clear, that an agent employed to sue [F], is not, therefore, authorized to receive payment [☞]. They said, it had been formerly doubted, whether payment to the attorney was payment to the party, though it was now settled to be so [1]. That the letter, so far from importing an authority to receive the money, implied the reverse, in case the note should not be paid voluntarily, because, in that event, *Fox* was

[☞] But if the agent in town, take money out of court, which the defendant has paid in under a judge's order, but irregularly, that shall bind the plaintiff, and be a waver of the irregularity. *Griffiths* v. *Williams*, *B. R. E.* 27 *Geo.* 3. 1 *Term Rep.* 710.

[1] *Vide Powel* v. *Little*, *B. R. H.* 20 *Geo.* 2. 1 *Blackst.* 8.

[F] In *De Moranda* v. *Dunkin*, 4 *T. R.* 119, this decision was mentioned with approbation: but it was distinguished from the circumstances of that case; in which a special appointed by the sheriff (at the of an agent in the country employed by the plaintiff to execute a writ) had arrested the defendant, and suffered him to escape, and the court decided that the plaintiff was bound by the act of the agent, and could not rule the sheriff to return the writ.

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YATES against FRECKLETON.

was to return it. If it had been meant, that he should also, in that case, receive the money, the note would have been left in his custody.

Fox having made no exculpatory *affidavit*, an absolute rule was made, that, upon payment by the defendant, of the debt and costs, (the costs of this application excepted,) to the plaintiff, all further proceedings should be staid; and that *Fox* should pay the debt and costs to the defendant, and also the plaintiff's costs of this application to him, on or before the 1st of *March*, otherwise an attachment to issue against him.

BRADBURY *against* WRIGHT.

Monday, 13th Feb.

On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee is entitled to receive the full rent, without deducting the land-tax.—Distress is not incident to a fee-farm rent as such, except the case is brought within the statute of 4 *Geo.* 2. c. 28. § 5 [F 1].

ACTION of *replevin*. The defendant makes conusance as the bailiff of one *Wilkinson*, and then states;—That *Eyre* and *Bretland* were seised in fee of the *locus in quo*, and that they, by indenture, dated the 20th of *April*, 1693, bargained and sold, aliened, released, and confirmed, the same, to *Jordan Bradbury*, his heirs and assigns, in *fee-farm*, for ever, yielding and paying, yearly, to *Bretland*, his heirs and assigns for ever, by half-yearly payments, at a place and on the times mentioned, the yearly rent of £4 17*s*. 6*d*. "*without any deduction, defalcation, or abatement for, or in any respect whatsoever.*" That seisin was delivered to him accordingly, and, by virtue of the said premises, *Jordan Bradbury* became and was seised in fee of the *locus in quo*. and *Bretland* became and was seised in fee of the *fee-farm rent* of £4. 17*s*. 6*d*. by the said indenture of *feoffment* so reserved and made payable to him, his heirs and assigns: Then deduces a title to the said *fee-farm rent* to *Wilkinson*, and alledges, that £2. 8*s*. 9*d*. of the said *fee-farm rent* for one half year, was in arrear, and that the goods were taken as a distress for the same.

[625]

[F 1] By that section, after 24th *June*, 1731, all persons and corporations have the like remedy, by distress, and by impounding and selling the same, in cases of rent-seck, rents of assize, and chief rents (which had been duly answered or paid for the space of three years within the space of twenty years before the first day of that present session of parliament, or should thereafter be created), "as by "2 *W*. & *M*. *sess*. 1. c. 5. *in case of rent* "*reserved upon lease*," *i. e.* where there is a clause of distress; but the wording is inaccurate; for it depends upon the insertion of such clause, whether the rent reserved is a *rent-charge*, for which distress may be taken, or a *rent-seck*.

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same.—*Plea in bar*, as to 2s. 1¼d. part of the said £2. 8s. 9d that, by the land-tax act of 1778, 17s. 4d. was assessed on the *locus in quo*, that a like rate for the said *fee-farm rent* would, by a just proportion, amount to the said 2s. 1¼d.; wherefore the plaintiff, according to the form of the said statute [1], did abate, deduct, and keep in his hands, the said 2s. 1¼d.; and, as to the residue, he pleaded a tender and refusal, prior to the time when, &c. and that, after the tender, and before the said distress was so made and taken as aforesaid, no request or demand was made of the said residue.—*General Demurrer*.

The question argued by the counsel, upon this record, was, Whether, by virtue of the words, "*without any deduction,* "*defalcation, or abatement, for, or in any respect whatso-* "*ever,*" the grantee of the rent was intitled to receive the whole, discharged of the land-tax? *Davenport* argued for for the defendant, in support of the demurrer, and *Chambre* the plaintiff [F 2].

For the defendant, *Brewster* v. *Kitchen (a)*, and a case of *Champernon* v. *Champernon*, before the present *Lord Chancellor* (*b*), were cited. In the first, upon a covenant to pay a rent-charge, *without deduction of any taxes for the said rent*, it was held, by Lord HOLT, and the whole court, that the rent was to be paid in full, without deducting the *land-tax* imposed by 4 & 5 *Will. and Mar.* This case was stated to be in point, and one of the reasons given by Lord HOLT for his opinion in that case seemed, it was said, *a fortiori*, applicable to the present; for the rent, there, was granted in 1649, and, although the present form of the land-tax, and which was established before the question arose, had not then been introduced, yet, (because taxes of *that nature*, *viz.* the monthly assessments, had obtained before that time, and there was, in the acts of the commonwealth, the same clause as in the then and present land-tax acts, for the tenants to deduct the tax out of their rent [2],) he thought, that the words of exemption must have been meant to comprehend such taxes, if imposed in future, and to exempt the grantee from the burthen of them. As to the present case,

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[1] *Vide* 4 *W.* & *M.* c. 1. § 6. Copied in all the subsequent land-tax acts.

(*a*) *B. R. H.* 9 *W.* 3. 1 *Ld. Raym.* 317. *S. C. Salk.* 198. *Carth.* 438.

(*b*) 1780.

[2] 4 *W.* & *M.* c. 1. § 13. Copied in the subsequent acts. *Qu.* If the clause referred to in the plea (*viz.* § 6.) was in the acts of the commonwealth.

[F 2] In the former editions, the arguments for plaintiff and defendant were reversed, by mistake.

case, the land-tax had been established in its present form just the year before the date of the deed on which the question arises, and, therefore, must have been in the contemplation of the parties. In *Champernon* v. *Champernon*, the question was upon the construction of a power to make jointures *free from taxes*, and the *Lord Chancellor* held, that the land-tax was particularly within the words of the power, as being the only tax to which land is absolutely liable.

Chambre insisted, that neither of those two cases applied, because, in both, the word "*taxes*" was expressly used. So, in *Hoopwood* v. *Barefoot*, where the tenant was also held liable to the land-tax, the words were still stronger, "And all sums "that now are or shall be *assessed or taxed* for and in respect "of the premises for chimney money, church and poor, or "*otherwise* (c)." He said, the question was, whether the defendant was intitled to the exemption, notwithstanding the clause in the land-tax acts, by which landlords, owners, and proprietors of lands, are authorized to abate and deduct a proportionable part out of every *fee-farm rent*, or other annual rent payable out of their lands, of the rate *taxed or assessed* on them (a). To intitle him to such exemption, the words *taxes or assessments* ought to have been used. The statute provides, by another clause, "That nothing therein "contained shall be construed to alter, change, determine, "or make void, any contracts, covenants, or agreements "whatsoever, between landlord and tenant, or any other per-"sons, touching the payment of *taxes and assessments* (b)." But neither could a case where nothing is said about *taxes* or *assessments*, be brought within that clause. The general expressions in the deed ought not to be extended to parliamentary impositions. They were a sort of words of course, and, in truth, meant nothing more than was comprehended in the reservation itself. With regard to the argument drawn from the time when the deed was made, it was to be considered, that the land-tax was then only occasional, and, therefore, it was not to be presumed, that the parties foresaw the permanent renewal of it, or had it at all in contemplation.

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BULLER, *Justice*, asked, if this did not, on the pleadings, appear to be that sort of rent for which there was no remedy by distress at common law, for he conceived, that, since the statute of *quia emptores* [F 3], a rent granted in fee could not be

(c) B. R. T. 8 *Ann.* 11 *Mod.* 238.

(a) 4 *W.* & *M.* c. 1. § 6.

(b) 4 *Geo.* 3. c. 2. § 32. 4 *W.* & *M.* c. 1. § 34.

[F 3] No rent service can be reserved, except by the king, since *quia emptores*, on any grant in fee. *F. N. B.* 210. *C.* Because no man can create

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be distrained for, without an express clause making it a rent-charge; and he denied *Davenport's* answer to this, *viz* that *fee-farm rents* were rent-charges; observing, that, by the definitions in all the books, the appellation of "*fee-farm*" only respected the proportion between the amount of the rent and the value of the land [1]. If this rent was a rent-seck, he

[1] *Feodi Firma appellatur, cum quis, ex dono vel concessione alterius, prædia tenuerit sibi et hæredibus suis, reddendo vel dimidiam vel tertiam, vel ad minus, quartam partem veri valoris. Tenens hujusmodi ad nulla servitia obligatur nisi quæ in ipsa charta continentur, exceptâ fidelitate, quæ omnibus tenuris incumbet.* Spelm. Gloss. 221. col. 1. "*Chescun fee-farm scraentend le verayc value del terre, qui est le cause n'aura ent reliefe.*" Brooke Abr. *title* Reliefe. 201. pl. 5 8. Cites 45 *Ed.* 3. 15. *and* Old Tenures.

Blackstone, (*Comm.* vol. 2. p. 43.) says, "A fee-farm rent is *a rent-charge* "in fee, issuing out of an estate in "fee, of at least one-fourth of the "value of the land at the time of its "reservation." And he cites *Co. Littl.* 143.; which does, at first, seem to authorize his definition; for the words of Lord *Coke* are, "It, (*i. e.* a "rent reserved by deed, with a clause "of distress,) is called a *rent-charge*, "because the land, for payment "thereof, is *charged* with a distress;" and then he goes on, immediately, to say, "If it be to the whole value of "the land, or to the fourth-part of the "value, then the rent is called a fee-"farm." *Blackstone*, probably, according to the most natural and obvious construction, understood the pronoun "*it*," in the second sentence, to relate to the same thing as in the former sentence, *viz.* to *rent-charge*. But it should seem, on considering the authorities above referred to, (though *they* do not *expressly* exclude the idea of distress,) together with the text of *Littleton*, that, by an inversion of language not uncommon even now, but frequently preferred, from affectation, in Lord *Coke's* time, the *relat. e.* in the second sentence, is placed *before* the noun substantive, *viz.* "*the rent*," to which it refers, and, therefore, the sentence ought to be understood as distinct and independent of the preceding one, and as if it had run thus: "*The rent*, "(*i. e.* a rent certain reserved to a man "and his heirs, which is what *Littleton* "is speaking of,) if *it* be to the whole "value of the land, or to the fourth "part of the value, is called a *fee-farm*." If this is the true construction, the inference is, that the description of *fee farm*, taken by itself, does not imply a power of distress; which seems to have been what *Buller*, Justice, hinted at. But a rent in fee, of the proportion required, would not cease to be a *fee-farm* rent, because a power

[illegible]cate a tenure of himself in fee. *Litt.* [illegible]5. But a rent-service may be reserved on a gift in tail, or for life, if the don[illegible] has the reversion in him. *Litt.* [illegible] So a rent may be reserved on a [illegible]nt in fee by deed, by way of ren[illegible]arge, if there be a clause of distress; or a rent-seck, if no such clause. *Litt.* 217. It seems, therefore, to follow, that any fee-farm rent, created since *quia emptores* by a subject, must be a rent-charge, or a rent-seck.

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he said the distress could not be supported but on the authority of 4 *Geo.* 2. *c.* 28. § 5. and the avowry had not stated, (according to that statute,) that the rent had been duly answered

power of distress was superadded. A *fee-farm* rent may either be a rent-seck or a rent-charge, and, (till the statute of *quia emptores,)* might have been a rent-service [† 128]. But then, in pleading, in order to justify in replevin, it would be necessary, not only to shew that the rent was a *fee-farm rent*, but also to call it a *rent-charge*, or to state that a power of distress was annexed to it. This, probably, could not have been done here, because, in fact, no such power was given by the deed.

[† 128] *Vide* Mr. *Hargrave's* Edition of *Co. Littl.* p. 144, *a. Note* (5), where the very learned editor is of opinion, "that the term '*fee-farm*' "is not properly applicable to any "rents, except *rents-service*" [F 4].

[F 4] Fee-farm-rent, is rent reserved upon a grant in fee: *(Fitz. N. B.* 210, *C.).* Provided it be not less than one-fourth of the value. *Co. Litt.* 144. *b.* Also, 2 *Inst.* 44, is expressly accordant, which is quoted in Mr. *Hargrave's* note to the preceding passage, as a contrary authority, viz. to shew that a rent reserved on a grant in fee, is a fee-farm rent, *whatever its quantum may be.* These are Lord *Coke's* words: "Either the rent upon "which it was before letten to farme, "*or at least one-fourth of that farm-* "*rent,*" and he there quotes *Britton*, (whom Mr. *H.* also relies on as an authority for his position), with an expression of *dissent.* "*But, Britton saith, fee farmes sont terres tenus en fee a rendre pur eux per ann le verau value, ou plus ou meins.*" Where it is observable that *Britton*, though he does not *express* Lord *Coke's* limitation to one-fourth, by no means *denies* it; but leaves it ambiguous. Therefore, he seems no direct authority for Mr. *Hargrave's* doctrine, even if he were not overpowered by Lord *Coke's* dissent. *Madox, Firma Burgi,* 3. whom Mr. *Hargrave* also cites as an authority, only says, "By fee-"farm is meant perpetual ferme or "rent." Without entering into the subject of *quantum.* The precedents of grants in fee-farm, which he there refers to in his *Formulare*, do not shew any thing as to the point of *quantum.* It is certain that lands held in fee-farm generally, were exempted from wardship, &c. in *Magna Charta*, c. 27. without any expression of the value. Therefore it would appear, that there was some understood value at common law, the payment of which entitled the tenant in fee-farm to such exemptions, and for this reason, as well as on the express authorities here collected, it seems the better opinion, that a fee-farm rent must, at the time of its creation, be at the least one-fourth of the value of the lands. With the greatest deference to Mr. *Hargrave's* superior learning and judgment, I cannot understand how the term fee-farm-rent can be confined to rent-service. It appears, by the principles above stated, (*note* F 3), that a fee-farm-rent cannot be a rent-service, unless created before *quia emptores*, or by a grant of the crown: and *Co. Litt.* in the place cited, 144, *a*, is express that a fee-farm-rent *may* be a rent-

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swered or paid for the space of three years, within the space of twenty years before the first day of the session of parliament, when the statute passed.

Davenport then said, he was inclined to think, the right to distrain was admitted by the plea.

On the principal point, Lord Mansfield said, with regard to *Chambre's* observations on the cases, that, in none of them, was there any mention of a subsequent *land-tax*. There could be no words stronger than those in the present case; and it would not have been clearer if the deed had run, "*without any deduction, defalcation, or abatement for taxes.*" He said, he thought there were cases in the equity books on this point, and desired the cause to stand over till this day, that they might be looked into.

1. The court now, on the principal point, declared their opinion, that the rent should be paid without any deduction for the *land-tax*; and founded themselves on the authority of the cases cited from Lord *Raymond*, *Salkeld*, *Carthew*, and 11 *Mod.* 2. As to the other point, they were of opinion against the defendant, for that the rent was, in its nature, a rent-seck, and the party could not distrain but under the statute, and therefore, in his avowry, he ought to have brought his case within it.

But, as the merits were in the defendant's favour, it was *agreed*, that the demurrer should be allowed, without costs on either side.

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rent-charge. *Blackstone's* error appears only to have been in stating, that it *must* be a rent-charge, by taking that which was simply meant by Lord *Coke* as an *instance*, to be a *definition* of a fee-farm-rent. In the case cited from the year-books 45 *Edw.* 3. p. 15, it seems not only that a fee-farm-rent is expressly limited to not less than one-fourth, but that the creation of such rents, by lease in fee-farm, since *quia emptores*, is recognized by *Finchden*, a judge. It seems, therefore, that where there is a lease in fee-farm, since the statute, there may be a fee-farm-rent, which is not a rent-service: but where there is *tenure in fee-farm*, the rent is rent-service.

The End of Hilary *Term*, 21 George III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING's BENCH,

IN

EASTER TERM,

IN THE TWENTY-FIRST YEAR OF THE REIGN OF GEORGE III.

PEARSON *against* CAMPION.

Wednesday, 2d May.

An apparitor cannot sue in the spiritual court for his fees.

DUNNING was to have shewn cause against a rule for a prohibition to the ecclesiastical court, in a suit, by an apparitor, for his fees; but he mentioned, that he found it had been decided, that a proctor or register, cannot maintain such a suit, and for this cited, *Pollard* v. *Gerrard* (a) [1]; and, as this case seemed to be within the same reason, he withdrew his opposition to the rule.

The rule made absolute.

(a) *B. R. M.* 13 *W.* 3. Ld. *Raym.* 703.

[1 *Vide*, also, *Johnson* v. *Lee*, *B T.* 8 *Will.* 3. 5 *Mod.* 238.

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Saturday, 5th May.

The King *against* the Inhabitants of St. Michael's in Bath.

If a man who is insolvent has conveyed his estate to trustees for the payment of his debts, and afterwards, before the trust is performed, gets fraudulently into possession, a residence of forty days will not gain a settlement.

THE court of Quarter Sessions for the county of *Somerset* confirmed an order of two justices, for the removal of *John Freeman*, from *Walcott*, to St. *Michael's* in *Bath*, and stated

"That the pauper, being entitled to two freehold houses in *Walcott*, one of the value of £28 a year, the other of £26 a year, in 1778, conveyed them by lease and release, to trustees, in trust, to be sold, and the money arising from the sale to be paid, first in discharge of two mortgages due thereon, amounting to £500, afterwards to his other creditors rateably, and the surplus, if any, to him, his executors, administrators, and assigns; That the houses were both let to other persons at the time of the conveyance, and the pauper then resided in a public house in the parish of St *Michael*, at the rent of £40 *per annum*, which he had occupied several years, till he failed; That, afterwards, one of the houses becoming void, the trustees having the possession and the key thereof, employed one *Betty Farrant*, then a lodger in the pauper's house, to clean the said vacant house, and paid her 3*s*. for so doing, and delivered her the key for that purpose, which having done, she placed the key in the bar of the public house, among some other things of her own which she kept there, intending afterwards to re-deliver it to the trustees, but that the pauper's wife took it from thence, and took possession of the vacant house, and, with her husband, had continued there ever since to the time of removal, being, in the whole, one year and three quarters; That one of the trustees, seeing her carrying her goods thither, gave her notice she was doing wrong, not having the consent of either the trustees or creditors, to which she replied, "I am going to my own estate, for I and the "children can't lie in the street;" That the premises had not yet been sold by the trustees; That the value thereof was about £650 at present, but at the time of the conveyance was something more; That the debts owing by the pauper, for which such trust deed was executed, including the two mortgages, were £881 and upwards; That it did not appear, on that deed, how the annual rents were to be disposed of till the sale should be made."

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Dunning and *Burroughs*, in support of the removal, contended, that the pauper had no property in *Walcott* by which he could gain a settlement, for that the conveyance divested the whole of his interest for the benefit of the creditors, the

debts

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The KING against St. MICHAEL'S.

debts being more than the value. They likened this to the cases of persons entitled to administration or dower, who reside without administration being granted, or dower assigned, and cited *Rex* v. *Widworthy* (b), and *Rex* v. *Painswick* (c), to shew, that such persons do not gain a settlement [† 129]. It must, they said, be intended, that the trustees were to have the immediate profits, as they had the possession. That the case of *Rex* v. *Natland* (d), which would perhaps be relied on by the counsel on the other side, was only an opinion of GOULD, *Justice*, on the circuit, and was not argued on the merits, in this court. If they were to admit that the pauper had a right to have resided till the sale, yet they insisted, that he could not have gained a settlement under the circumstances which had happened, because the possession was acquired by wrong.

Gould and *Morris* argued, against the orders, that the trustees had no beneficial, and the creditors no legal interest. The beneficial interest remained in the grantor till the sale, and there was no doubt but that a settlement might be acquired by an equitable estate. If this case differed from that of a mortgagor in possession, it was stronger in favour of the settlement, because a mortgagee has both the legal and a beneficial interest. This did not resemble the case of *Rex* v. *Widworthy*, because, till administration, nobody has a right where there are several next of kin. A sole next of kin would gain a settlement before administration. In *Rex* v. *Painswick*, it was argued, and could not be denied, that there were many things that might bar the dower, and prevent an assignment from being ever made. ASTON, *Justice*, was dissatisfied with the decision in that case. Here, the pauper, at any time, might have prevented the sale, by tendering the money. The trustees could not have maintained an ejectment against him till after the sale, and by joining with the vendee. These were private transactions, which the parish had no right to pry into, and the court would not, in a settlement case, enter into the amount of a man's debts, nor enquire whether there would, or would not, be a surplus. They also relied on *Rex* v. *Natland*, and mentioned a case of a devise to trustees to sell, where the testator's children continued to reside, and gained a settlement; and said it must have been the same, if the devise had been to sell to pay debts.

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Lord MANSFIELD,—If the estate on which a pauper resides is substantially his property, *that* is sufficient, whatever forms

(b) *T.* 10 & 11 *Geo.* 2. *Burr. Settl. Cases*, No. 31.

(c) *T.* 14 *Geo.* 3. *Burr. Settl. Cases*, No. 243.

[† 129] *Vide Rex* v. *North Curry*, *M.* 22 *Geo.* 3.

(d) *M.* 15 *Geo.* 3. *Burr. Settl. Cases*, No. 247.

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The King against St. Michael's.

forms of conveyance there may be; and, therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner. But here, what interest had the pauper in this estate [r 1]? He made an immediate conveyance to trustees, not a mortgage, to sell and pay off two mortgages and other debts, and when this conveyance was made, it was so doubtful whether there would be any surplus, that the deed says that he shall have the surplus *if any*. He had only a chance of a residue, and had not a right to continue a moment in possession. A mortgagor has a right to the possession, till the mortgagee brings an ejectment After the mortgagee has got into possession *he* might gain a settlement. There is still another and a stronger ground, in this case, for the possession was gained by fraud.

Willes, and Ashhurst, *Justices*, of the same opinion.

Buller, *Justice*,—I am of the same opinion. To make this resemble the case of a mortgagor, an instance must be shewn in which the mortgagee had been in possession, and has lost it again by fraud [r 2].

Both the orders confirmed.

[r 1] In *R.* v. *Tarrant Launceston*, as it is reported in 3 *East*, 226, the court appears to have reverted to this doctrine of Lord *Mansfield*, (which seems questioned in *R.* v. *Edington*, *cit. infrà*,) and to have wished to confine the acquisition of settlements by estate, according to the strict word of 9 *Geo.* I. *c.* 7. s. 5. to the continuance of the *interest* in the estate.

It was there held, that a pauper, who after marriage, purchased an estate, under £30, and afterwards conveyed to trustees (in trust out of the rents, to raise a sum of money, and to pay the residue to his wife for life, and after her death to the husband) though he continued in possession, gained no settlement as by residence on the equitable estate of his wife. [illegible]at decision however may be suppo[illegible] on a different ground, mentione[illegible] the argument, viz. that the settl[illegible]nt would depend on the act of [illegible] original purchaser of an estate under £30. And I find from an M. S. note of this case, that this objection was first started by the court, during the argument on the other side, in these pointed terms. "If the original estate was insufficient in value "to give the husband a settlement, "can the owner, by *granting away* "*part of it*, make it sufficient?" May not this be considered as the better foundation for this decision? It appears otherwise difficult to reconcile it with R. v. *Edington*.

[r 2] "In the case of R. v. *St. Michael's*, *Bath*, it was said, that "either a mortgagor, or mortgagee "might gain a settlement, *according* "*to circumstances*. One of those "circumstances is possession; and "upon possession all the questions "have turned." *Per Buller*, J. In *R.* v. *Catherington*, 3 *T. R.* 771: where it was held, that a mortgagor, who having been turned out of possession by ejectment at the suit of the

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The KING *against* GREAVES.

Saturday, 5th May.

An original order of bastardy may be made at the Quarter Sessions.

AN *original* order of bastardy was made at the *Nottinghamshire* Sessions, (*Easter* 1780,) which having been removed into this court, and a rule granted to shew cause, why it should not be quashed, the court desired the counsel against the order to begin.

Baldwin stated the principal objection to be, that the Sessions have no original jurisdiction in making orders of bastardy, and mentioned Dr. *Burn*'s opinion and reasoning on that point (*e*), and *Wood*'s or *Prudgeon*'s case in *Bulstrode* (*f*).

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Howarth, in support of the order, said, there were four or five cases which had decided that the statute of *Car*. 1. (*g*), gives the Sessions an original jurisdiction.

BULLER, *Justice*, read, from *Bott* (*h*), *Slater*'s case (*i*), and the court were clearly of opinion, that the Sessions have an original jurisdiction [2].

The order confirmed.

(*e*) *Burn*'s *Justice*, 13th *Ed*. vol. 1. p 105.

(*f*) *B R*. 13 *Car*. 1 2 *Bulstr*. 355. *S. C Cro*. *Car*. 341 350.

(*g*) 3 *Car*. 1. c 4.

(*h*) *Bott* 2nd. *Ed*. p. 119.

(*i*) *B R. E* 13 *Car* 1. *Cro*. *Car*. 470.

[2] *Vide Rex* v. *Cleg M* 8 *Geo* 1. 1 *Str*. 475, where an original order made at sessions was confirmed. It was not objected to on that ground, but, on the contrary, the authority to make such an order was admitted.

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the mortgagee, afterwards inhabited one of the houses on the estate, by permission of the agent of the latter, gained no settlement, having neither *jus in re* nor *ad rem*. This doctrine was fully confirmed in *R.* v. *Edington*, 1 *East*. 288; where the court said, that the best ground of the decision of the principal case was the *possession* being fraudulent; and held, there, that a party remaining in possession of an estate would gain a settlement, notwithstanding a conveyance made in the mean time, of the legal estate to trustees, in trust to raise a sum of money by sale or mortgage, and afterwards to reconvey. There was no evidence of what had been done under the trust, nor of what surplus would remain after the execution of it. It was a case in which value was not material, and the court considered in general, that such a *cestui que* trust is on the same footing with respect to settlements as a mortgagor.

1781.

Tuesday, 8th May.

PEACOCK *against* RHODES and Another.

A bill of exchange with a blank indorsement, being stolen and negotiated, an innocent indorsee shall recover upon it, against the drawer.

IN an action upon an inland bill of exchange, which was tried before WILLES, *Justice*, at the last Spring Assizes for *Yorkshire*, a verdict, by consent, was found for the plaintiff, subject to the opinion of the court on a special case, stating the following facts:

"The bill was drawn at *Halifax*, on the 9th of *August*, 1780, by the defendants, upon *Smith, Payne, & Smith*, payable to *William Ingham*, or order, 31 days after date, for value received. It was indorsed by *William Ingham*, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at *Scarborough*, received the bill from a man not known, who called himself *William Brown*, and, by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at *Scarborough*, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. *William Ingham*, to whom the bill was payable, indorsed it; *John Daltry* received it from him, and indorsed it; *Joseph Fisher* received it from *John Daltry*; and it was stolen from *Joseph Fisher*, at *York*, (without any indorsement or transfer thereof by him,) along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of *Ingham*."

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Wood, for the plaintiff, argued, that the bill was taken, by *Peacock*, in the ordinary course of business, and there was no pretence that he had notice that it had been obtained unfairly. If he had, he admitted that he could not recover. A bill indorsed by the payee, is to be considered to all intents as cash, unless he chooses to restrain its currency, which he may do by a special indorsement, as, "Pay the contents to *William Fisher* (k)." The very object in view, in making negotiable securities, is, that they may serve the purposes of cash. The case of *Miller* v. *Race* (l), although the question there arose upon a bank-note, establishes

Ancher v. *The Bank of* [illegible] (l) B. R. Hil. 31 Geo. 2. 1 Burr. 452.

blishes the principle just stated. If this bill had not been stolen, but lost, the owner might have maintained *trover* against the finder, but still the *bonâ fide* holder would have been entitled to recover upon it. This was determined, with respect to a note upon a banker payable to *A.* or bearer, in the case of *Grant* v. *Vaughan* (m). Here, the bill was indorsed blank, but *that* was the same thing in effect, as if it had been made payable to the bearer. A blank indorsement is an indorsement to all the world; to any body who shall happen to be the bearer. There was a case of *Francis* v. *Mott*, directly in point to the present, tried before Lord MANSFIELD, two or three years ago. There, a bill, with blank indorsements, had been picked out of the holder's pocket, at *Manchester* races. Being offered in payment to a house at *Manchester*, who did not know the persons whose names appeared upon it, they sent to enquire about their credit, and finding them responsible, gave a valuable consideration for it, and sent it to their correspondent at *London*. He carried it to the drawee for acceptance, who detained it, and said it was stolen; upon which the house at *Manchester* brought an action against the drawer. The *Attorney-General* was for the defendant, and Mr. *Dunning* for the plaintiff. The *Attorney-General* attempted to shew, that the defendants knew the bill had been unfairly obtained, and, having failed in that proof, he gave up the cause, and the plaintiff recovered. The argument on the part of the present defendants, would extend to all cases of fraud and imposition, as well as theft, and would stop the currency of bills of exchange, because it would render it necessary for every indorsee to insist upon proof of all the circumstances, and the manner in which the bill came to the indorser. As the negligence, in this case, was on the part of the person who lost the bill, the loss ought to fall upon him; not upon the plaintiff.

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Fearnly, for the defendants,—The cases on this subject are all modern, but all of them establish a distinction between bank notes, or banker's cash notes payable to bearer, and indorseable bills or notes. The two first sorts *only* are considered as cash. No case that I have found is exactly in point to that before the court. In *Price* v. *Neale* (n), which was the case of a forged bill, that had been accepted, and paid to the defendant in the course of trade, your Lordship held, that the acceptor, having given credit to it by his acceptance, should not recover back what he had paid to a *bonâ fide* holder; but, in the present case, there was no acceptance.

Walmsley

(m) B. R. T. 4 Geo. 3. 3 Burr. 1516.

(n) B. R. M. 3 Geo. 3. 3 Burr. 1354.

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PEACOCK against RHODES.

Walmsley v. *Child* (o), before Lord HARDWICKE, was upon cash notes payable to bearer. Lord HOLT makes the distinction between bills and cash notes, in *Tassell & Lee* v. *Lewis* (p). So, in *Hodges* v. *Steward*, bills payable to bearer, and bills payable to order, are distinguished (q). Every indorsement of a bill of exchange is considered as a new bill. This was laid down by your Lordship in *Heylin* v. *Adamson* (r); and, in *Miller* v *Race*, a bill is considered as being only a security or document for a debt. The case of the *Executors of Devallar* v. *Herring* (s), seems exactly in point for the defendants. It is there laid down, that, if the indorsee of a promissory note lose it, and the finder pay it away in the course of trade, the indorsee may maintain *trover* against the person to whom it has been so paid. The arguments from inconvenience are in favour of the defendants. No man is obliged to take a bill of exchange in payment. [636] A trader should not, in prudence, take a bill, unless he know the person from whom he receives it. But if the law were as contended for on the part of the plaintiff, the temptations to theft would be increased.

Lord MANSFIELD told *Wood*, he need not reply, and delivered the opinion of the court, as follows:

Lord MANSFIELD,—I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee [r] An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note

(o) Canc. 11 Dec. 1749. 1 Vez. 341.
(p) 1 Ld Raym. 743.
(q) B. R. 3 W. & M. 1 Salk, 125.
(r) B. R. M. 32 Geo. 2. 2 Burr. 669. 674.
(s) Scacc. T. 9 G. 1. 9 Mod. 44. 47.

[r] So, in *Collins* v *Martin*, 1 *B. & P.* 648, it was held that bills of exchange, wrongfully pledged by one banker to another, could not be recovered in trover from the latter by the party who had deposited them with the former, for the purpose of receiving them and placing them to his account: the banker with whom they were pledged not being privy to the circumstances under which they were placed in the other's hands.

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note for money won at play (*t*) I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. *Wood* has cited, from that of *Miller* v. *Race*, downwards, to that determined by me at *Nisi Prius*.

The *Postea* to be delivered to the plaintiff.

(*t*) *Vide Lowe* v. *Waller*, *T.* 21 *Geo.* 3. *infra*, 736.

[637]

WORTLEY *against* RAYNER.

Wednesday, 9th May.

On a plea of coverture, and verdict for the defendant, she has and cannot have execution for the costs, without a *scire facias*.

ON a plea of coverture, in an action of debt upon a judgment, a verdict was found for the defendant, and writ of *fieri facias* sued out for the costs, commanding the sheriff to levy and pay them to the defendant, *and her husband*. A rule was granted to shew cause, why the writ, and proceedings thereon, should not be set aside for irregularity, it being a maxim, that a person, not a party to the record, cannot be benefited, nor charged by the process, without a *scire facias*.

Cause was this day shewn; but the court was clearly of opinion, that the proceedings were irregular.

ASHHURST, *Justice*, said, the wife might have had process in her own name, because, the plaintiff having declared against her as sole, he was concluded from denying it.

The *Attorney-General*, for the plaintiff.—*Dunning*, for the defendant.

The rule made absolute [1].

[1] *Vide Penoyer* v. *Brace*, *T.* 9 *Will.* 3. 1 Ld. *Raym* 244.

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Thursday, 10th May.

Ancher and Others *against* the Governor and Company of the Bank of England.

A bill of exchange being drawn by A. on B. payable to C. or order, and indorsed by C. in these words,—"The within must be credited to D. value in account,"—D. being indebted to B. and the bill being sent to B. and accepted by him, and he having given D. notice that he had received it and placed it to D.'s account, this is such a special indorsement as restrains the negotiability of the bill. And if, afterwards, a forged indorsement purporting to be by D. to pay to F. or order, is written upon it, and the bill is discounted, the person discounting it shall stand to the loss. And if an agent of A. (B. having become insolvent,) pay the money for A. and take up the bill, A. may recover back the money paid by his agent to the person who discounted it, in an action for money had and received.

ONE Captain *Dahl*, a *Dane*, and resident in *Denmark*, being indebted to the house of *Claus Heide & Co.* in *London*, applied to one *Mastue*, to procure him a bill, in order to discharge the debt. *Mastue* accordingly obtained a bill from the plaintiffs at *Christiana* on *Claus Heide & Co.* with whom they had a correspondence; which bill was as follows:—"*Christiana*, 17th *January*, 1778. Two months "after sight, please to pay this, our *sola* bill of exchange, to "Mr. *Jens Mastue*, or order, one hundred and twenty "pounds sterling, value in account, and place it to account, as per advice from—*Karen** *widow of Christian* "*Ancher, & sons*—To Messeurs *Claus Heide & Co.* of "LONDON."—On this bill was written by *Mastue*, an indorsement, in the *Danish* language, of this import:—"The "within must be credited to Captain *Morten Larsen Dahl*, "value in account. *Christiana*, 17th *January*, 1778, *Jens* "*Mastue*"—And it was remitted to *Claus Heide & Co.* in the following letter:—"Agreeable to the desire of Captain *Morten Larsen Dahl*, of *Arendall*, I have inclosed, "for his account, sent you *Karen Ancher & sons*' bill, on "yourselves, for £120, which you will, on receipt, be "pleased to credit his account with, and advise him of the "same."—The bill was received by *Claus Heide & Co.* and accepted, and they gave notice to the plaintiffs, and to *Dahl*, that they had received it, and placed it to his account. Afterwards, a forged indorsement, in *English*, was written upon it as follows:—"For me, to pay Mr. *Detleff* "*D. Muller*, or order. *Morten L. Dahl*."—*Muller*, who was a clerk in the house of the acceptors, carried the bill, thus indorsed, but which never had been in the hands of *Dahl*, to the *Bank*, and indorsed it with his own name, upon which it was discounted, in the ordinary course of business. When the day of payment came, the acceptors having become insolvent, and *Muller* having absconded, the bill was protested; and one *Fulgberg*, as a friend or agent for the plaintiffs, came to the *Bank*, and paid it for their honour as the drawers; but, the forgery having been discovered, this action for money had and received was brought against the *Bank*, on the ground, that the bill was not negotiable, on account of the special indorsement, and that it had, therefore, been discounted by the *Bank*, in their own wrong, and the money paid by *Fulgberg*, to take it up, paid by mistake.

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The cause was tried at *Guildhall*, before Lord MANSFIELD, at the Sittings after last *Term*, when his Lordship directed a nonsuit, and it now came on in court, on a motion for setting aside the nonsuit, and granting a new trial.

The *Attorney-General*, for the defendants,—The *Bank* is perfectly innocent of any fraud. The bill was in their hands for a valuable consideration. The drawers, by bringing this action, adopt the payment by *Fulgberg*, and make him their agent, and, when a drawer pays a bill, it becomes a matter of account between him and the acceptor, and all the indorsers are discharged. This bill was originally drawn payable to order, but the particular indorsement, it is said, made it not negotiable. There can be no doubt, however, but that *Dahl* might still have indorsed and negotiated it. It is true, as his name is forged, he never can be called upon as an indorser, but his debt is discharged by the credit given him by *Claus Heide & Co.*

Dunning, and *Davenport*, for the plaintiffs,—The bill was taken up by the plaintiff's agent, without authority, but it was *bonâ fide*, and for the best, and therefore they have done right to indemnify him. The parties are all innocent, but the *Bank* have been negligent, and the mistake in paying them ought to be rectified. The *Attorney-General's* rule, as to the discharge of indorsers, by the payment by the drawer, applies only where the drawer has paid, with a full knowledge of the circumstances. If the *Bank*, in this case, could not have sued the drawers, they cannot retain the money; which brings it to the question, Whether a bill that has once been negotiable, must always continue so, and cannot have that quality restrained by a particular indorsement, as, "Pay to *A. B.*, and no one else," or the like? The constant practice, with regard to remittances of rents from the country, shews, that negotiability may be restrained in that manner. Those remittances are made by bills payable to order, but are generally indorsed by the payee to his banker, without saying "*or order*," for the express purpose of stopping their negotiability. If a bill gets to the drawee, its negotiability ceases. This had been in the hands of the drawees. Notice was given by them to the plaintiffs, that they had received it, and to *Dahl*, that they had applied it to the discharge of his debt.

Lord MANSFIELD,—The ground of the nonsuit was, that the purpose for which the bill was drawn was answered, it having been applied to the credit of *Dahl*, and he having acquiesced. It therefore occurred to me, that the drawers had received no injury, and had no interest. But, (which was not attended to at the trial,) there has been a second payment, *for the honour of the plaintiffs*, and it is contended, that

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ANCHER against The BANK of ENGLAND.

that a consideration has arisen on that second payment.—Where there is equal equity, possession must prevail; and the equity is equal between persons who have been equally innocent, and equally diligent. The question, therefore, is, whether the *Bank* has been equally diligent. A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined upon argument. A blank indorsement makes the bill payable to bearer, but, by a special indorsement, the holder may stop the negotiability.—[640] *Mastue* did so here. It does not seem to me, that, after the special indorsement by *Mastue*, *Dahl* himself could have indorsed it over. *Mastue* did not mean to make himself answerable as an indorser, or to enable *Dahl* to raise money on the bill. The *Bank* could not have maintained an action, on the bill, against the plaintiffs. It was their negligence not to read the special indorsement.

WILLES, *Justice*,—I am of the same opinion. The question is, whether the negotiability is not restrained by the indorsement; and I think it is. The *Bank* either did read, or ought to have read, the indorsement. The only doubt is, what should be the effect of the bill's having been taken up by a third person; but I think he must be taken to be the agent of the plaintiffs.

ASHHURST, *Justice*,—I am of the same opinion The question is, did the *Bank* use due diligence? If they had attended to the indorsement, they would not have discounted the bill. I think *Dahl* himself could not have indorsed it. It was never the intention that *Claus Heide* & Co. should pay money to *Dahl*, but only that the amount should be set off in his account If the *Bank* have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by mistake.

BULLER, *Justice*,—I have the misfortune to differ from the rest of the court. As to the forgery, it was decided, in the case of *Price* v. *Neale*, in this court (a), that if a forged bill has been taken up, the money shall not be recovered back from an innocent indorsee. Therefore, as against such an indorsee, the forgery is not material. As to the indorsement by *Mastue*, it amounts to an indorsement to *Dahl*, and makes him the proprietor; and, the bill being originally negotiable, it seems to me to have continued so. What is called a restrained indorsement, *viz.* that the bill was to be credited to *Dahl*, appears to amount to the same thing as "*Pay to* "*Dahl*." The words "*or order*" are omitted, but it has been determined, that such omission does not stop the negotiability

(a) M. 3 Geo. 3. Burr. 1355. Since reported 1 Blackst. 390.

gotiability of a bill [† 130]. The circumstance, that there was an account between *Dahl* and the drawees, cannot affect third persons who knew nothing of that account. But, if the bill was only meant to pay the drawees, why was it not cancelled by them, when they *received it? Why did they accept it? Did not that hold out negotiability to the rest of the world? This is an answer to any supposed negligence in the defendants. Besides, if the bill was not meant to be negotiable, why did the plaintiffs take it up? *That* was done by another person, as it is said, for their honour; but they have, by bringing the action, adopted his act.

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Lord MANSFIELD,—The whole turns on the question, whether the bill continued negotiable. As the case stands at present, let the nonsuit be set aside, but we will consider of it farther, and if we alter our opinions we will mention it.

The case was never mentioned any farther.

The rule made absolute [† 131].

[† 130] *Edie* v. *The East India Company*, *B.R. T* 1 *Geo.* 3. 2 *Burr.* 1216.

[† 131] The cause was again tried at the ensuing Sittings, before Lord *Mansfield*, when the jury, by his Lordship's directions, found a verdict for the plaintiffs.

CORNU *against* BLACKBURNE.

Friday, 11th May.

An enemy's ship which has ransomed a *British* vessel, being retaken with the hostage and ransom bill on board, but the bill secreted, and not delivered up to the recaptor, the first captor may recover upon the ransom bill.

IN an action of *assumpsit* upon a ransom bill, which was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after the last *Term*, a verdict was found for the plaintiff, subject to the opinion of the court, on a case, which stated,

That the ship *Dolly*, (mentioned in the declaration,) was captured by the *Princesse de Robecq* privateer, commanded by the plaintiff, on the 6th of *June*, 1780, upon the high seas, at the heighth of *Edinburgh*, in her voyage from *Lynn* to *Liverpoole*, laden with corn: That the *Dolly*, and her cargo, then were the property of the defendant: That the plaintiff then was a natural-born subject of the *French* King, from whom the privateer had a commission, and that *Thomas Finchett*, the master of the *Dolly*, and the defendant, then were natural-born subjects of the King of *Great Britain*: That, at the time of the capture, a ransom bill was signed at sea, by and between the plaintiff *Finchett*, and *John Butler*, the mate of the *Dolly*, (who was then given as an hostage to the plaintiff,) which ransom bill is in the *French* language, and, being translated into *English*, is as follows:—

'No. 66. REGISTERED the present ransom bill at the 'Admiralty-office, *Boulogne*, the 25th *October*, 1779, and 'delivered

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'delivered in double to Captain *Robert Cornu*, commanding 'the cutter, the * *Princesse de Robecq* privateer, of this port, 'by me underwritten Chief Register.—Signed *Merlin*, *Boulogne*.'—"WE, the underwritten *Robert Cornu*, of *Boulogne*, commander of the ship the *Princesse de Robecq*, "privateer, of *Boulogne*, and *Thomas Finchett*, of *Liverpoole*, master of the ship the *Dolly*, of *Liverpoole*, have "agreed as followeth, viz.—That I, *Robert Cornu*, commander of the said privateer, acknowledge to have ransomed the said ship the *Dolly*, of *Liverpoole*, belonging "to *John Blackburne*, burgher, of *Liverpoole*, burthen 105 "tons, on the 6th of *June*, in the year 1780, at the heighth "of *Edinburgh*, going from *Lynn* to *Liverpoole* in *England*, "under *English* colours, and passport of said *England*, "loaded with wheat, for the account of *John Blackburne* "burgher, of *Liverpoole*; which vessel I have agreed to ransom for the sum of £1300 sterling, to be paid to Mr. "*Hausoullier*, fitter of the said privateer, at *Dunkirk*, in "consideration of which I have set the said vessel at liberty "to go to the port of *Liverpoole*, where she is to be arrived "in the time and space of three months, after the expiration "of which, this present agreement shall not clear her from "being taken by any other privateers. For security of which "ransom, I have received for hostage on board of the said "ship, *John Butler*, cousin to the captain of the said vessel, "desiring all friends and allies to let safely and freely proceed the said vessel to the port of *Liverpoole*, without any "let or molestation, during the said time or course of her "voyage, and I, *Thomas Finchett*, as well in my name, as "in that of the said *John Blackburne*, owner of the said "ship and merchandizes, have voluntarily submitted to the "payment of the said ransom, viz. £1300 sterling; for "surety whereof I have delivered up the said *John Butler*, "of *Liverpoole*, for hostage, promising not to go against "the conditions of this present contract, whereof each of us "have a copy by us, which we have signed, with the said "hostage. Signed on board the said ship, the 6th of *June*, "in the year 1780. And it is further expressly covenanted "and agreed, that I, the said *Thomas Finchett*, do bind and "oblige [illegible] and engage my vessel and cargo, to pay or "cause [illegible] to the owners of the said privateer, the "full [illegible] said ransom, should the said hostage "come to [illegible] or to desert, or that the said privateer should "perish, or be taken with the hostage on board, *without* "*which condition the captain of the said privateer would* "*not have consented to the above ransom, which, in all cases* "*whatsoever*, shall be well and truly paid.—(Signed) *Robert* "*Cornu*. *Thomas Finchett*. *John Butler*."

That the value of the *Dolly*, and her cargo then on board, amounted

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amounted to the sum of £1800, contained in the ransom bill. That the said ship, after her capture, and having been ransomed, was set at liberty, and, afterwards, arrived safe at her destined port of *Liverpoole*. That, on the 16th of *June*, 1780, the *Princesse de Robecq* was taken at the height of *Yarmouth*, by two frigates belonging to the King of *Great Britain*, with *Butler*, the hostage on board, and carried as a prize into an *English* port. *That at the time of the capture of the privateer, the said ransom bill was on board, but was not delivered up to the captors, nor was the same ever possessed by them.* That, at the time of the capture of the *Dolly*, and at the time of the capture of the privateer, there was an open war between the King of *Great Britain* and the *French* king.

Lee, for the plaintiff.—The question is, whether the recapture of an hostage given for securing the payment of a ship's ransom, operates as a recapture of the ship itself, and destroys the contract, notwithstanding an express stipulation to the contrary in the ransom bill. The only case on this subject which is to be found in the courts of common law in this country, is that of *Ricord* v. *Bettenham* (a), and that case seems to be so decisive, that it will be necessary for the counsel on the other side to question some of the doctrines there established.—1. The first objection to this action is, that the plaintiff being an alien enemy, the contract is void. But the objection of war to the validity of a contract, is not universal. States at war with one another may contract for the exchange of prisoners, &c.; and individuals, for ransom, &c. The power of the individual to contract, is the same with that of the state, with this exception, that he cannot make a contract prejudicial to the interest of the state of which he is a member. This doctrine is recognized by the writers on the law of nations, and, if such contracts have (as those writers allow) a moral obligation, the law will give them a legal and compulsory obligation.—2. It will be contended, that the contract of ransom depends on the hostage, and is so interwoven and connected with the pledge, that the recapture of the one discharges the other. But it was decided in *Ricord* v. *Bettenham*, that the *death* of the hostage did not discharge the contract, that the party trusts to two securities, and though he loses one, the other continues. In order to discharge the contract by the loss of the pledge, there must be an express agreement for that purpose, and, here, there is a direct stipulation to the contrary. This is established, not only by the decision in *Ricord* v. *Bettenham*, but also by two cases there cited, *viz.* *Sir John Ratcliff* v. *Davies*

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(a) B. R. M. 6 Geo. 3. 3 Burr. 1734. Since reported 1 Black. 563.

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Davies (a), and *The South Sea Company* v. *Duncomb* (b). A *dictum* of *Molloy*, was relied on in *Ricord* v. *Bettenham*, where he says, "If hostages are taken, he that gives them "is freed from his faith; for that, in receiving hostages, he "that receives them hath relinquished the assurance which "he hath in the faith of him who gave them (c)." But that passage relates to hostages between states, not individuals. It is in the chapter on alliances between *Princes*, between whom, a regard to the hostage, and the dread of each other's power, is *the only security* for the observance of contracts. It may be argued, that, the privateer being taken with the hostage *and bill* on board, this amounted to a recapture, and the ransom bill became the property of the captor. I answer, that the rights of spoliation are odious, and not to be extended to any thing not absolutely seized and reduced into possession; and for this there is an express authority in *Grotius*: "*Ex eo quod diximus,—captivos nostros servos non esse,—sequitur, cessare illam acquisitionem universalem quam accessionem esse dominii in personam diximus alibi. Non alia, ergo, captori acquiruntur quam quæ specialiter apprehenderit; quare, si quid clam secum habet captivus, non erit acquisitum, quia nec possessum.*" And he, afterwards, considers such concealed property, as so very far from being acquired by the captor, that he says, "*Cui consequens est, ut res eo modo celata ad redemptionis pretium solvendum prodesse possit, quasi retento dominio* (d)." Perhaps it may be said, that, by the law of nations, the captor might take the life of the captive, and that, in consideration of his departing from that right, the captive relinquishes all property in every thing on board. But the law of nations is not so. It authorises

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no cruelties but what may be necessary to secure the capture; and, independent of the general law of nations, there is an express stipulation on this subject between *France* and *England* in the treaty of *Utrecht*, which was copied from the marine treaty with *Holland*, of 1674.—(Lord *Mansfield* said, that clause in the treaty related only to captures in time of peace for contraband trade; but that the law of nations was as stated by *Law.*)—The ransomed ship has had the whole benefit of the ransom. If she had been taken again, the law of *France* would have protected her against such second capture, unless she had been out of her course, or beyond the time stipulated by the bill. This appears from *Valin, Commentaire sur L'Ordonnance de la Marine* (b) [as cited in *Weskett* on Insurance

(a) B. R. T. 8 Jac. 1. Yelv. 178, 9.
(b) B. R. M. 5 Geo. 2. 2 Str. 919.
(c) Moll. B. 1. c. 8. § 7.
(d) Grot. de Jur. Belli. L. 3. c. 21. § 28.
(b) 2 Valin. 258.

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Insurance (c)]. There is a very curious question agitated by *Quintilian (d)*, and referred to by *Puffendorff (e)*, which bears a near analogy to the present. It is, How far an interest in a loan, or, more properly, how far a right to vacate and extinguish a contract made between third persons, can be acquired by war: *Quintilian* states a case, which he supposes to have been argued before the college of *Amphictyons*. The case was, that *Alexander* the Great, upon taking *Thebes*, found an instrument of obligation, from the *Thebans* to the *Thessalians* [F 1], for 100 talents. The *Thessalians* then served in *Alexander*'s army; and he, as a reward for their services, gave them up this instrument. The *Thebans* are supposed to have afterwards recovered possession of their own country, and to have demanded the debt before the *Amphictyons*. The arguments on the part of the demandants are stated very ingeniously in *Quintilian*, and an answer is attempted to be given to those arguments in *Puffendorff*. One of the arguments, however, to which *Puffendorff* gives no answer, and which strikes me as particularly applicable to the present question, is this "*Non in tabulis esse jus*:" That the existence of the right did not depend on the instrument which was the evidence of it. To apply this to our case, I would say, the right to the ransom does not depend on the possession of the ransom bill. Though, if it did, *we are in possession of it*; and, therefore, are in that situation in which the *Thebans* would have been, if an accident had restored to them the possession of that instrument of which *Alexander* deprived them. But the bill is evidence of, not essential to, the right. If it had been [646] lost, or destroyed, a court of equity would have enforced the contract; and, if the original agreement had been merely verbal, an action would have lain upon it. There seems to be no assignable difference between the capture of a ransom bill, and that of any other absolute engagement for the payment of money; a bond, for instance. And yet, it will scarce be contended that the captor of a vessel, on board of which a bond is found, acquires any property in the contract secured

(c) *Title Ransom*, p. 412.
(d) *De Instit. Orat. L. 5. c. 10*
(e) *L. 8. c. 6. § 23.*

[F 1] This is stated erroneously. The *Thebans* had lent the money to the *Thessalians*, and of course the instrument of obligation was from the *Thessalians* to the *Thebans*: otherwise it would have been in the wrong custody. The error arises from a misconception of the phrase *mutua dedisse*. It is correctly stated in *Puffendorff* and in *Kennett*'s translation.

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cured by that bond; or that, by delivering up the bond to the original obligor, he discharges all the remedies of the obligee against the obligor. Had the bond been lost or destroyed in the case I suppose, or the ransom bill in this, a court of equity would have enforced the contract they contained. A doubt arose, at the trial, whether the special clause in this bill, and which is not to be found in the ransom bill in the case of *Ricord* v. *Bettenham*, was not inserted by the captain, after he went to sea, and without proper authority. Your Lordship desired that an enquiry should be made into that matter before the case should be argued; and we have a certificate from the officers of the marine at *Dunkirk*, declaring, that, to their knowledge, the clause was in the ransom bill before the ship sailed.—(He read this certificate.)—There has been no case like this decided at the Commons. In *August*, 1779, several *English* vessels had been taken by a *French* privateer called *Le Prince de Robecq*. This privateer was afterwards captured by an *English* vessel, *with the hostages and ransom bills*, and the owners of the *English* vessels were condemned in salvage. But the matter was not litigated, and the payment of the salvage was made before condemnation, to furnish an answer to any claims which might be made for the ransom. There was another case of a capture by the same privateer, *Le Prince de Robecq*, which was contested; that of the *George & Nelly*. There, at the time when the captor was taken, the bill was on board, in a chest in the cabin where the hostage also was confined during the action; but it was not found by the captor after the engagement, nor did any body know what was become of it. The court of Admiralty *(a)* decreed salvage to the amount of $\frac{1}{8}$ of the value of the ransom bill, "*for the recapture thereof, and of the hostage (b).*" To ground that determination, they must have presumed a complete capture of the bill itself, and that it had afterwards been lost. But, here, that cannot be presumed, because this ransom bill exists, and was actually produced in court at the trial. I come now to consider the statute of 19 *Geo.* 3. *c.* 67. § 44. Independent of that statute, every thing taken from the enemy belongs to the state [1]. To bring the ransom bill within that statute, the recaptors would be bound to shew, that, at the time of their taking the *French* vessel, it came under the description of "ship or goods belonging to some of his Majesty's subjects," and was before taken by his Majesty's enemies. But this

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(a) 10th *Feb.* 1780, *Inglis & others* v. *Fall.*

(b) These were the words of the sentence.

[1] *Vide Wright*, Justice's, opinion, to the contrary; and "That, at common law, the subject is entitled to the property of what he takes from the enemy." In *Morrough* v. *Comyns*, *E.* 21 *Geo.* 2. *B. R.* 1 *Wils.* 211. 213, and he cites the *Register* 102. 6, and *Bro. Tit. Property*, *pl.* 18. 38.

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this description cannot apply to the hostage, nor to a ransom bill which first arose out of the capture, and never was the property of any of his Majesty's subjects.

Wood, for the defendant,—There is no case on the subject, except *Ricord* v. *Bettenham*. I do not mean to question the authority of that case, nor the principles upon which it was decided. But, there, the hostage was carried into the enemy's dominions, and there died; and it would be extremely hard indeed, if, because the act of God has destroyed one security, the other should be annulled. In this case, neither the ransom bill nor the hostage ever reached the territories of the enemy. It is a clear principle, that, till then, whatever has been gained by capture, may be recovered by recapture. If the prize itself had been retaken, the property of the captor would have ceased, and, the ransom bill and hostage being put in the place of the prize, the same rule should govern both. I have enquired, and find, that it is the received opinion at the Admiralty, that the capture of the hostage and ransom bill annuls the contract. There have been many decrees for salvage, besides that in the *George & Nelly*. In that case, the defence was, that the ransom bill was not seized, but the court decreed salvage and costs; and there has been no appeal. The under-writers universally understand, that, in cases of this sort, they are only to pay the salvage. If the ransom bill remained, in all events, a complete security, it would follow, that both *that* and the hostage ought to be restored by the Admiralty, in cases where they are taken. There would be instructions given to our commanders of men of war, and letters of *marque*, not to touch them. As to the special clause in this ransom bill, I understand it is quite new, and was never heard of till the present war. It was fabricated in *New England*, and adopted by the *French*. But it is a fraud on the general policy of this country, as it tends to discourage cruizers, by depriving them of the advantages arising from recaptures, and, therefore, the court will not give it effect. The insertion of it furnishes an argument, that the parties understood, that, without it, by the taking of the hostage, the contract would have been discharged. The concealment of the bill by the *French* captain was fraudulent, for there was an implied duty in him to deliver up every thing. The statute of 19 *Geo. 3. (a)* requires all papers to be sent to the Admiralty, and the captain took an oath, that all papers had been delivered up. At any rate, the bill having been on board the ship when she was taken, was, like every thing else in the ship, taken at the same time.

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Law, in reply, observed, that if such oath as *Wood* had mentioned, was administered to the captain, it was without authority; and Lord MANSFIELD said, there was nothing concerning

(*a*) C. 67, § 21.

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cerning any oath stated. *Law* also observed, that the clause alluded to in the statute of 19 *Geo.* 3. only related to ship's papers.

Lord MANSFIELD,—It is sound policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice. The additional clause is particularly adapted to this case. There is no pretext to impeach it, on the ground of fraud or extortion. The bill was registered before the *French* ship sailed, with this clause in it. Nor does any inference arise, from its insertion, that the general law was understood to be otherwise; for it is, also, stipulated, that the death of the hostage shall not vacate the contract, which stipulation the parties must be presumed to have known to be unnecessary, because the decision in *Ricord* v. *Bettenham* was notorious over all *Europe*. Learned lawyers were written to on that occasion, both in *France* and *Holland*, and Mr. *Justice* BLACKSTONE shewed me several letters he had received from abroad, on the subject. It is said, that, by the law of nations, the recapture puts an end to the ransom bill; and

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the argument is, that the court of Admiralty decrees salvage for retaking the ransom bill. But what are the cases brought to prove this position? None of them were litigated but the last, and, there no ransom bill was forth-coming. Upon what was salvage given in that case: They seem to have mistaken the nature of salvage. They seem to consider it as a debt which may be exacted. But no man can be compelled to pay salvage, unless he chooses to have the property back. They have confounded distinct subjects. What is the eighth part of a ransom bill? Can the eighth part of an hostage be claimed as salvage? Could the recaptor make use of the ransom bill? Could he bring an action on it in the foreign captain's name? When the owner gets possession of the ransom bill, it may be a different consideration. But the present case is clear on two grounds. 1. The special clause is decisive; and, 2. Independent of that clause, there never has been any capture of the ransom bill. The authority from *Grotius* is very strong on this last ground.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, of the same opinion.—The last ground goes all the length; for the bill was never taken.

The *Postea* to be delivered to the plaintiff[1].

[1] A subsequent case upon a ransom bill, *viz.* *Anthon* v. *Fisher* & *another*, which is now depending for the judgment of the court *(a)*, came on

(a) Vacation after *T.* 22 *Geo.* 3.

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CORNU against BLACKBURNE.

for argument in *Easter Term*, 22 *Geo.* 3. when it was spoken to by *Law*, for the plaintiff, and *Baldwin*, for the defendants. Afterwards, Lord *Mansfield* directed, that it should be again argued by a civilian on each side, and, in *Trinity Term*, 22 *Geo.* 3. on *Friday* the 14th of *June*, Dr. *Wynne*, the *King's Advocate*, was heard for the plaintiff, and Dr. *Scott*, for the defendants. In that case, the ransom bill declared on was in the same form with that in *Cornu* v. *Blackburne*. Besides the general issue, the defendants pleaded, specially,—That, after the ransom of their ship, (The *Peace*,) the captor's ship, (*viz.* a *French* privateer, called *Le Compte de Guichen*,) while cruizing with the ransom bill and hostage on board, and before the captured ship, or the ransom bill or hostage had been carried to, or within any part of the dominions of the *French* King, was taken as a prize, by the *Aurora*, an *English* ship of war, and, with the ransom bill and hostage, brought into *England*: That the Captain of the *Aurora* requested the Captain of the *French* ship to deliver up all the ransom bills and papers which were on board his ship when it was taken, but that he did not deliver up the ransom bill in question, but fraudulently and deceitfully concealed and withheld it, and falsely and fraudulently declared that he had delivered up all the ransom bills which were on board when his ship was taken: That, before the action brought, the *French* ship was condemned as lawful prize.—There was another special plea of the same import, but not mentioning the hostage. The plaintiff demurred to both the special pleas, and assigned for cause, that they amounted to the general issue.—That point, however, was little relied on, and seemed to have no weight with the court. The main question argued was the same as in *Cornu* v. *Blackburne*. Dr. *Scott*, besides the former point, (*viz.* that the actual or virtual recapture of the ransom bill annihilates the contract, or rather, as Dr. *Scott* put it, transfers the right from the original captor to the recaptor.) contended that questions on ransom bills [650] arise out of *matter of prize*; are to be decided by the *jus belli*; and, therefore, are not triable in this court, but belong exclusively to the court of prize. To this Dr. *Wynne* answered, that, though the contract of ransom happens to be connected, in point of time, with the capture as prize, it does not necessarily arise out of it, but is, in truth, a mere simple contract of sale, between individuals, who, at the time, and for the purpose of the contract, are considered as not being the subjects of hostile states. A great variety of new authorities were cited, chiefly from foreign writers, and particularly many passages in *Valin's* Commentary on the *French* Ordinance of 1681, which had been pointed out by Lord *Mansfield*, when he directed that the case should be argued by civilians. Most of those passages, as far as *Valin's* opinion goes, are in favour of the position, that the recapture of the ransom bill puts an end to the claim of the captor. In one place he says:—"*Si le preneur* "*est pris lui même avec le billet de ran*-"*çon, il perd sa rançon avec son proper* "*navire, et le tout passe au preneur* "*dont il est la conquête.*" 2 Val. Liv. 3. Tit. 9. Art. 19. p. 286. [† 132].

☞ For

[† 132] In *Michaelmas* Term, 23 *Geo.* 3. *Anthon* v. *Fisher* stood for judgment, when Lord *Mansfield* delivered his opinion in favour of the plaintiff; but *Willes*, and *Buller*, Justices, thinking the courts of common law had no jurisdiction, and that that objection might be taken, although not particularly

larly

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☞ For more concerning the Law of Ransoms, *vide Yates* v. *Hall*, *B. R. M.* 26 *Geo.* 3. 1 *Term Rep.* 73 to 81.

By 22 *Geo.* 3. c. 25, it is enacted, "That it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his Majesty's subjects, or any merchandizes or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects" (§ 1). By § 2. "all contracts and agreements which shall be entered into, and all bills, notes, and other securities, which shall be given by any person or persons for ransom of any such ship or vessel, or of any merchandize or goods on board the same shall be absolutely void in law, and of no effect whatever." And, by § 3. a penalty of £500 is given to the informer, for every offence against the act. This statute has put an end to all questions, in future, on the law of ransoms.

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larly pleaded, and *Ashhurst*, Justice, expressing doubts on that point, judgment was, *pro formâ*, given for the plaintiff, in order to give an opportunity of bringing a writ of error. This was afterwards done, and, in *M.* 35 *Geo.* 3. by the unanimous opinion of all the Judges of the *Common Pleas* and the *Exchequer*,—who concurred in holding that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war, —the judgment given in the court of *King's Bench* was reversed. *Vide Poreau* v. *Hartley*, *B. R. T.* 23 *Geo.* 3. ☞*Gist* v. *Mason*, *B. R. H.* 26 *Geo.* 3. 1 *Term Rep.* 84, 85 [F 2].

EDDIE *against* DAVIDSON.

Monday, 14th May.

If on an execution against one of two partners, the partnership goods are taken and sold, the sheriff is to pay over to the other a share of the produce proportioned to his share in the partnership effects.

THE defendant was partner with one *Birnie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the plaintiff had sued out execution on a bond of the defendant's, for £700, and the sheriff had levied on the partnership effects. *Birnie*'s assignees obtained this rule, to shew cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an *affidavit* of *Birnie*'s, that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The plaintiff's *affidavit*, on shewing cause, denied that *Birnie* had an equal share in the partnership effects,

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[F 2] S. P. *Brandon* v. *Nesbit*, 6 *T. R.* 23, and *Bristow* v. *Towers*, *ib.* 35. *cit. suprà*, 253, in *Planché* v. *Fletcher*, *q. v.*

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effects, and stated that he had embezzled the joint stock to a considerable amount [F].

The court directed that it should be referred to the Master to take an account of the share of the partnership effects to which *Birnie* was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees [1].

The *Attorney-General*, and *Douglas*, for the plaintiff.—*Howorth* and *Bower*, for the assignees.

[1] *Vide Bachurst* v. *Clinkard*, *B. R. M. 2 W. & M.* 1 *Show.* 173, and *Heydon* v. *Heydon*, *B. R. M. 5 W. & R.* 1 *Salk.* 392. [† 133]. ☞ *Vide*, also, *Shipp* v. *Harwood*, *Canc.* 1747, mentioned by Lord *Mansfield*, *Cowp.* 449.

[† 133] *Vide Comb.* 217, and *Jacky* v. *Butler*, *B. R. E.* 2 *Ann.* 2 *Ld. Raym.* 871.

PAYNE and Others *against* BACOMB.

Wednesday, 16th May.

Though a plaintiff fail in proving a special agreement in *assumpsit*, he may go into evidence on the general counts [F].

THIS was an action of *assumpsit*, tried on the last Home Circuit, before ASHHURST, *Justice*.—The first count of the declaration set forth a special agreement, by which the defendant undertook to contribute to the expence of a suit for tithes then depending in the court of *Exchequer*. To this was added a count for money laid out and expended; and anolter upon an *insimul computasset*.—The plaintiffs endeavoured

[F] But partnership goods may be taken under a *distringas*, to compel the appearance of some of the partners, notwithstanding another partner, who has appeared, has paid for those goods, and is a creditor to the rest of the firm. *Morley* v. *Strombom*, 3 *B. & P.* 254.

In *Parker* v. *Pistor*, and *Chapman* v. *Koops*, 3 *B. & P.* 288, 289, it was attempted, on the authority of the principal case, to *compel* plaintiffs who had taken partnership goods in execution, to enter into the account between the defendant and the other partners, before they should have the fruit of their executions; but this was refused, and this case was distinguished, because here no objection was made to an account being taken, and the only question was on the proportion.

[F] But where there is a special contract *still subsisting*, and on which the plaintiff only fails to support his action by a variance in his declaration, he cannot recover on a common count money paid by him as earnest to bind that bargain: *Cooke* v. *Munstone*, 1 *N. R.* 351, and *Mansfield*, C. J. there supposes that, in the present case, there must have been a special agreement

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PAYNE against EACOMB.

voured to prove the agreement, but failed; upon which they were going into evidence on the general counts.—The Judge would not permit this to be done, and directed a nonsuit.—The case now came on in court, upon a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, on the ground of a misdirection.

Lord MANSFIELD,—This was formerly the rule, when the fashion was, to lay hold of a nonsuit wherever it could be done. When I went the Western Circuit, a case of this sort came before me. I was strongly inclined against the practice, and permitted the plaintiff to go into the general counts, and I consulted Sir EARDLEY WILMOT, who went the circuit with me, and he approved of it [1]. It was afterwards mentioned to the other Judges, who concurred with us in opinion.

The rule made absolute.

[1] His Lordship probably meant *Harris* v. *Oke*, *Winch*. Summ. Assises, 1759. *Law of Nisi Prius*, *Ed* of 1775, p. 139.

[652]
Thursday, 17th May.

WHITCOMB *against* WHITING.

The acknowledgment of one out of several drawers of a joint and several promissory note, takes it out of the statute of limitations, as against the others, and may be given in evidence on a separate action against any of the others.

DECLARATION, in the common form, on a promissory note executed by the defendant; *Pleas*: the general issue, and *non assumpsit infra sex annos*; *Replication*, *assumpsit infra sex annos*. The cause was tried before HOTHAM, *Baron*, at the last Assizes for *Hampshire*. The plaintiff produced a joint and several note executed by the defendant, and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking *that* was sufficient to take the case out of the statute as against the defendant, a verdict was found for the plaintiff.

On *Friday*, the 4th of *May*, a rule was granted to shew cause, why there should not be a new trial, on the motion of *Lawrence*, who cited *Bland* v. *Haslerig* (a); and, this day, in support of the application, he contended, that the plaintiff,

(a) *C. B. H.* 1 & 2 *W.* & *M.* 2 *Ventr.* 151.

ment by the defendant to pay a share of the expences of the suit in the *Exchequer*, but that agreement *had not been strictly pursued* by him, and consequently he recovered for the money actually laid out by him to the defendant's use, on evidence of his connexion with the defendant in that suit, and the obligation of the latter to pay.

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WHITCOMB against WHITING.

plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case, the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of *Heylin* v. *Hastings (b)*, reported in *Salkeld (c)* & 12 *Modern (d)*; and, in *Hemings* v. *Robinson (e)*, it was decided that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a *mesne* indorser that the indorsement on the back of the note was in his hand-writing; but the court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

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Lord MANSFIELD,—The question, here, is only, whether the action is barred by the statute of limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one, is payment for all, the one acting, virtually, as agent for the rest [F 1]; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

WILLES, *Justice*,—The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

ASHHURST, and BULLER, *Justices*, of the same opinion.

The rule discharged [1] [† 134].

(b) B. R. H. 10 *Will.* 3.

(c) 1 *Salk.* 29.

(d) 223.

(e) C. B. M. 6 *Geo.* 2. *Barnes* Qto Ed. 436.

[1] The case of *Bland* v. *Haselrig*, (cited *supra*, p. 652. *Note (a)*.) was a *joint* action against four: the *plea*, the statute of limitations; and a *verdict*, that *one* of the defendants did assume within six years, and that the others did not; and it was held, by *Pollexfen*, *Ch. J. Powell*, and *Rokeby*, (against *Ventris*,) that the plaintiff could not have judgment against that defendant who was found to have promised

[F 1] So if one out of several payees of a bill of exchange be within the realm, the absence of another beyond sea is no answer to a plea of the statute of limitations. *Perry* v. *Jackson*, 4 *T. R.* 516.

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mised within the six years.—That case may be explained on the manner of the finding; for, and as the plea was *joint*, the replication must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in this case of *Whitcomb* v. *Whiting*, the jury ought to have considered the promise of one as the promise of all, and, therefore, should have found a general verdict against all.

[† 134] The following case was argued and determined, *B. R. H.* 23 *Geo.* 3.

CARVICK *v.* VICKERY.

This was an action by the indorsee of a bill of exchange, which was in the following form:

" Mr. *Abraham Vickery*,

" Two months after date, please to pay *to us or our order* the sum of, *&c.*

" *John Maydwell*

" *John Maydwell.*"

It was indorsed thus;

" *Jn. Maydwell.*

Holloway."

The *Maydwells* were father and son. The indorsement was by the son. They were admitted not to be partners. The bill, when due, was presented to the defendant, and accepted; and at the time of the acceptance, he wrote upon it a direction to his banker to pay it. The cause was tried, at the Sittings after *M.* 23 *Geo.* 3. at *Guildhall*, before Lord MANSFIELD, who nonsuited the plaintiff, because there was not an indorsement by both the parties to whose order the bill was made payable. In *H.* 23 *Geo.* 3. *Howorth* obtained a rule to shew cause, why there should not be a new trial; and the case was argued, on *Saturday*, the 1st of *February*, 1783, by *Wallace*, and *Law*, for the defendant, and *Howorth* and *Wood*, for the plaintiff.

In support of the nonsuit, it was insisted, that it was clear, when two or more persons are the payees of a bill of exchange, (which in this case the drawers were,) and there is no partnership between them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill must have been, to prevent its being paid without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself *and the other*, yet, without evidence of a partnership, the other would not have been bound. The first promise of the acceptor was to pay to the order of *two*, and a new promise to pay to the order of *one* could not be raised, without a consideration. It would be a *nudum pactum*. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerns the partnership trade. This was determined in the case of *Pinkney* v. *Hall (a)*. [654] The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb* v. *Whiting*, may be cited on the other side; but it is not *ad idem*. The statute relative to promissory notes *(b)* only enables *such servant or agent as is usually entrusted* by the principal to bind him by his signature *(c)*. A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

On the other side, it was argued, that two persons, by joining in the same bill, hold themselves out to the world as partners, and, therefore, for that

(a) *B. R.* 8 *W.* 3. 1 *Salk.* 126.
(b) 3 & 4 *Ann.* c. 9.
(c) § 1.

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WHITCOMB against WHITING.

that purpose are to be treated and dealt with as such. It appears by the evidence, that the acceptance and order to the banker were after the indorsement; that order, therefore, amounted to a recognition of the power of the one to bind the other. Besides, the son had the custody of the bill, which implied an authority from the father to negotiate it.—They cited *Whitcomb* v. *Whiting*.

Lord MANSFIELD,—I have looked into that case, and do not think it *ad idem*. The general question is of great importance, *viz.* Whether an undertaking, by a bill of exchange, to pay *A. and B.* is an undertaking to pay *A. or B.* We will therefore, take some time to consider of it. As to the order to the banker, it seems to me nothing more than a direction to pay to persons properly authorized.

WILLES, *Justice*,—I incline to think the order to the banker a recognition of the indorsement [F 2].

ASHHURST, *Justice*,—I do not think the order acknowledges the authority of the indorsement. If the banker had afterwards discovered that the indorsement was forged, he might have refused payment.—(*Wallace* had mentioned a case from *Bristol*, of a draft on Messrs. *Hoares*, accepted by Messrs. *Childs*, where that happened.)

BULLER, *Justice*, — I think the order to the banker makes no difference. But it seems to me, that, when a bill goes out into the world, the persons to whom it is negociated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so.

The court took time to deliberate, till *Tuesday*, the 4th of *February*, when Lord MANSFIELD delivered their unanimous opinion, that the *Maydwell's*, by making the bill payable "*to our order*," had made themselves partners as to this transaction.

The rule made absolute.

At the ensuing Sittings, at *Guildhall*, on *Monday*, the 3d of *March*, 1783, the new trial came on, before Lord MANSFIELD and a special jury; when *Wallace*, for, the defendant, stated and offered to prove, that, by the universal usage and understanding of all the bankers and merchants in *London*, the indorsement was bad, because not signed by both the payees.

Howorth, on the other side, objected to any evidence of that sort; insisting, that the point was a question of law, and had been decided by the court.

Lord MANSFIELD said, he did not think the question was so decided as to preclude the evidence offered; and, therefore, over-ruled the objection.

Wallace then called Mr. *Gosling*, an eminent banker, to prove the usage; but the jury, *unâ voce*, declared they knew it perfectly to be as he had stated it; and, without hearing the witness, found a verdict for the defendant.

[F 2] See *Hankey* v. *Wilson*, *Say*. 223. *contrà*.

1781.



Friday, 18th May.

Bree *against* Holbech.

A personal representative having found among the papers of the deceased a mortgage deed, and having assigned it more than six years ago for the mortgage money, affirming and reciting in the deed of assignment that it was a mortgage deed made or mentioned to be made between the mortgagor and mortgagee for that sum, the assignee shall not recover back the mortgage money, although it shall turn out that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brings his action, unless the assignor knew it to be a forgery.

IN an action of *assumpsit* for £2000, had and received to the plaintiff's use,—The defendant having *pleaded* the general issue, and the statute of limitations,—The plaintiff *replied*; *That the writ was sued out on the 22d of *August*, 1780; that, on the 18th of *February*, 1773, the defendant asserted and affirmed, that there was an indenture of mortgage, dated the 24th of *June*, 1768, *made, or mentioned to be made*, between *F.* and *S.* of the one part, and *W. H.* (the defendant's uncle,) on the other, for a term of years, granted to the said *W. H.* as a security for the payment of £1200, with interest; that the defendant then further asserted and affirmed, that, after making the said indenture, *W. H.* died; that the defendant was his administrator with the will annexed, and there was due to him, as administrator, the said principal sum on the said security; that the plaintiff, relying on these assertions and affirmations, advanced £1200 to the defendant, on his executing an indenture of assignment, on the said 18th of *February*, 1773, which recited the mortgage, and purported, for the consideration of the £1200 so advanced, to assign all the premises by the said recited indenture of mortgage granted, for the remainder of the term, subject to the original power of redemption; that, in this indenture of assignment, the defendant agreed with the plaintiff, that neither the said *W. H.* nor the defendant, had done any act to incumber the mortgaged estate; that the said several assertions and affirmations of the defendant, and also the recitals in the said indenture of assignment, were false, inasmuch as there never was any such indenture of mortgage, nor the sum of £1200, nor any other sum, due to the defendant, as administrator of *W. H.* on such security, in the manner the defendant had asserted and affirmed, and as in the indenture of assignment was recited, or in any other manner, and that neither the premises, nor any part thereof, passed by the assignment, to the plaintiff, nor did any estate, right, or title, therein, or to the said sum of £1200 vest in him; that, by fraud and imposition, and by means of the said false assertions and affirmations, and false recitals, the plaintiff was induced to pay the said sum of £1200 on the execution of the said indenture of assignment; that, at the time of the execution thereof, and of paying the money, the plaintiff was ignorant of the falsehood of the said assertions, affirmations, and recitals, and of the fraud so practised upon him, and did not discover them till within

*[655]

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BREE against HOLBECH.

within the space of six years next before suing out the writ[1]. *To this replication, the defendant *demurred* generally. The case was, this day, argued by *Hill*, Serjeant, for the plaintiff; and *Chambre*, for the defendant.

*[*656]

Chambre, in support of the demurrer, contended, that there was nothing alleged in the replication which could take the case out of the statute. There was no fraud stated to have been practised *by the defendant*; for it was not averred[F 1], that he knew of the falsehood of the different assertions and recitals. But, if there had been fraud, that would not have been sufficient; it was the plaintiff's business to look to the validity of his security; and there is nothing relative to fraud among the different exceptions and savings in the statute.

Hill, Serjeant, insisted; 1. That, in point of law, this was fraud on the part of the defendant, although he himself might not know of the falsehood; 2. That, where a party has been induced, by fraud, to pay money, the statute of limitations does not run, or, at least, only runs from the time when the fraud is discovered.—1. The assertions of the defendant, he observed, were positive, without qualification, and, therefore, he made himself answerable for the truth of them: and, if any loss had been incurred by his mistake, it ought to fall upon him, not upon an innocent third person. On this first head, he cited, 1 *Show*. 68. 3 *Mod*. 261. *Comberb*. 163. *Hearne's Pleader*, 102. 224. *Cro. Car*. 141. Sir *W. Jones*, 196. 2 *Burr*. 112. 12 *Mod*. 494. 2 *Vez*. 198.—2. On the second point, he relied on *Booth* v. *Lord Warrington*, in *Dom. Proc*. 1714. (which he cited from the printed cases,) and *The South Sea Company* v. *Wymondseil*, 3 *P. Will*. 143(*a*).

Lord MANSFIELD,—The basis of the whole argument is fraud; and the question is, whether fraud is any where asserted in this replication. There *may* be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of Sir *Crisp Gascoyne*, who insured a life, and affirmed it was as good a life as any in *England*, not knowing whether it was, or was not. There may be cases too, which fraud will take out of the statute of limitations. But, here, every thing alleged

[1] The mortgage deed was one of the many forgeries which had been committed by one *Dadley*, an attorney in eminent practice at *Coventry*, and which were not discovered till after his death.

(*a*) *Canc. M*. 1732.

[F 1] See *Haycraft* v. *Creasy*, 2 *East*. 92.

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*[657]

leged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage deed among the papers * of his testator, without any arrears of interest, and parts with it, *bonâ fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but, only, that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it [F 2].

Hill had leave to amend, in case, upon inquiry, the facts would support a charge of fraud.

Wednesday, 23d May.

The King *against* the Inhabitants of Hulland.

When a pauper has resided part of the year in one parish, and part in another, at different times and intervals, making, when added together, more than forty days in each, his settlement is in the parish where he slept the last night.

THE court of Quarter Sessions for the county of *Derby*, quashed an order of two Justices, for the removal of a pauper and his family, from the liberty of *Hulland*, to the parish of *Bradley*; and stated specially as follows:

At *Whitsunday*, 1768, the pauper, who was a blacksmith, being then a single man, hired himself at *Hulland*, for a year, to one *Joseph Copstake*, blacksmith, who had a house and shop at *Bradley*, and another house and shop at *Hulland*, and who resided occasionally at each place, but whose family resided constantly at *Bradley*. The pauper served the year. He worked at the shop at *Hulland*, and lay there five nights in the week during the year, except three weeks together, in the latter end of *February*, and the beginning of *March*, 1769, and sometimes a night or two in the week besides, when he lay at *Bradley*, and on the *Saturday* and *Sunday* nights the year through, he lay at *Bradley* and never at *Hulland*

[F 2] In *Cripps* v. *Reade*, 6 *T. R.* 606, the court said, that they had no wish to disturb the rule of *caveat emptor* adopted in cases where a regular conveyance is made, to which other covenants are not to be added: But in that case the agreement was by parol, and money was paid by the plaintiff to the defendant for the purchase of leasehold premises, under a misapprehension, by both parties, that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not: And it was held that the money might be recovered, as paid under a mistake; the action being brought within six years of the purchase.

land on those nights. He never resided 40 days together in either place; but resided more than 40 days at each in the year, and *the last two nights* in the year he resided at *Bradley*.

Dunning, and *Parker Coke*, shewed cause, in support of the order of Sessions. They argued, that, where there is a mixed residence of this sort, the best rule is, what the Sessions had followed, *viz.* to count backwards in each parish, and to establish the settlement where you first find 40 days. In the case of *Rex* v. *Lowess* (*a*), which had been cited when the rule was moved for to quash the present order, it appeared, that, during the greatest part of the end of the year, the pauper had lodged in the parish where he had resided the last night. Neither the arguments of the counsel, nor of the Judges, are stated in the report of that case; but it is probable the court went upon *that* ground, and not on his having slept *the last night* in the parish where they determined his settlement to have been gained.

Balguy, on the other side, insisted, that the principle of the determination in *Rex* v. *Lowess*, was, that the last night of the residence was to be connected with the former service in the same parish, and reckoned as one and the same. That the decision did not proceed on the majority of time in the latter part of the year.

Lord Mansfield absent.

Willes, *Justice*,—There must be some principle to govern such cases as this. Mr. *Dunning* has cited no authority in support of his position, that the majority is to be the rule, and, indeed, it is hard to say, here, in which of the two parishes the pauper resided most. The rule laid down by Mr. *Balguy* seems a very good one [F].

Ashhurst, *Justice*,—This case, from its circumstances, does not afford much room for argument. There ought, if possible, to be a *certain* rule, and the case cited seems to furnish one which is very reasonable.

Buller, *Justice*,—It is, in general, of much more importance to have a fixed rule, than what the rule is. If that which Mr. *Dunning* contends for had been established, it might

(*a*) *E.* 16 *Geo.* 3. *Burr. Settl. Ca.* No. 258.

[F] Precisely the same point was reconsidered and confirmed in *R.* v. *Brighthelmstone*, 5 *T. R.* 188, the Judges declaring that the rule ought not to be disturbed, although they would have construed the statute differently, if they had not been bound by former decisions.

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might have been a very proper one; but the court, in the case of *Rex* v. *Lowess*, can hardly have gone upon that ground, because it does not clearly appear there, in which of the two parishes the longest residence had been [1].

The order of sessions quashed.

[1] It was mentioned by a gentleman at the bar, that he recollected ASTON, *Justice*, in the case of *Rex* v. *Lowess*, to have given his opinion expressly on the circumstance of the last night [† 135]. ☞ The same principle is recognized as to settlements gained by apprenticeship, by *Willes*, and *Buller*, Justices, in *Rex* v. *Sandford*, *T.* 26 *Geo.* 3. 1 *Term Rep.* 281. 284, 285.

[† 135] In *Rex* v. *Iveston*, *E.* 23 *Geo.* 3. the rule in *Rex* v. *Lowess*, as stated in the present case by *Balguy*, was confirmed by Lord *Mansfield*, and the rest of the court.

[659] Wednesday, 23d May.

The KING *against* the INHABITANTS of NORTHFIELD.

A marriage is void, and no settlement is gained by it, if celebrated in a chapel erected since 26 *Geo.* 2. although marriages may have been *de facto* frequently celebrated there.

TWO Justices had made an order to remove *Abigail Jones*, the widow of *Joseph Jones*, from the parish of *King's Norton*, to the parish of *Northfield*; which last parish appealed to the Quarter Sessions; and they confirmed the original order; and stated specially:

That the pauper, *Abigail Jones*, being, whilst sole, a settled inhabitant at *King's Norton*, in the year 1775 intermarried with *Joseph Jones*, a settled inhabitant at *Northfield*, at *Buerlyhill* chapel, in the parish of *Kingswinford*, in the county of *Stafford*, *which was erected in the year* 1765, and then duly consecrated, and in which divine service had been publicly and regularly celebrated ever since; *and wherein banns of marriage had been often published, and marriages celebrated previous to the marriage in question:* That the said chapel was a new one, erected since the marriage act, and not erected on the foundation of one that was ancient; and no act of parliament was obtained for erecting the said chapel, or for celebrating marriages there.

The two orders being removed by *certiorari* into this court, the only question appeared to be, whether the marriage, upon the facts stated relative to the chapel, was void, by the provisions of the statute of 26 *Geo.* 2. *c.* 33.

It is enacted, by § 1. of that statute, that, from and after the 25th of *March*, 1754, all banns of matrimony shall be published

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published in the parish church, or in some public chapel, *in which public chapel banns of matrimony have been usually published*, of or belonging to the parish or *chapelry* wherein the persons to be married shall dwell; and, by § 8. that, if any person shall, (from or after the date above-mentioned,) solemnize matrimony in any other place than a church, or public chapel, where banns have been usually published, unless by special licence, &c. every person knowingly and wilfully so offending, shall be deemed guilty of felony, &c. and all marriages solemnized, (from and after, &c.) in any other place than a church, or public chapel, (unless by special licence, &c.) *shall be null and void to all intents and purposes whatsoever*.

When the *Attorney-General* moved for a rule to shew cause, why the orders should not be quashed, Lord Mansfield seemed to discourage the attempt to try a question of such serious consequence, in a collateral way, on a settlement case; and said, he would turn the parish complaining of the removal round, if he could.

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Bearcroft now shewed cause. He admitted, that, when the validity of a marriage under the marriage-act, becomes a question in the case of a settlement, it is not necessary that there should have been a sentence of the spiritual court, in order to entitle the parties interested to shew the nullity of such marriage. This had been determined in the case of *Rex* v. *Preston near Feversham*(a). But he contended, that the words "*usually published*" in the act, ought to be construed to mean, "*usually published at the time when the marriage in question took place.*" If so, there was enough stated in the case, for the court to consider this as a chapel in which banns had been usually published. The word "*often*" is nearly tantamount to "*usually*;" but, if it were not, yet, as it is a rule that an order of sessions is always to be supported, unless something appears expressly on the face of it which shews it to be against law, the court would intend this to be such a chapel as the act required, there being no direct assertion of the contrary. The act, he said, was supposed to have been drawn by a very eminent person(b); it had been warmly opposed; and, if the intention had been to restrain the celebration of marriages to parish churches and to chapels in which banns had been usually published before the act, it was probable an explicit enactment to that effect would have been introduced. If the construction contended for on the other side should prevail, this act would prove a trap to clergymen and innocent persons, who could not be expected to search

(a) M. 33 Geo. 2. Burr. Settl. Ca. No. 154.

(b) Lord Hardwicke.

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search into history, to discover the exact time when marriages first begun to be celebrated in any particular chapel. It was hard perhaps to draw a line, but, here, an usage was clearly established long before this marriage took place.

The *Attorney-General*, and *Batt*, argued against the validity of the marriage. They said, the act was to be construed as if the case had happened the day after it passed. Usage *since* could not vary the case; for, to give operation to usage, it must have a legal commencement, because *quod ab initio non valet, tractu temporis non convalescit*. Arguments of hardship and inconvenience could only be resorted to, when the law was doubtful, but here the words of the statute were clear. This was no more a trap than any other prohibitory law. After the passing of the act, no marriages had been attempted to be celebrated in *Lincoln's-Inn* Chapel, *Gray's-Inn* Chapel, and many others, although they were old chapels; because banns had not been usually published in them; and it would be absurd, if a chapel erected since the act should be in a better situation, in that respect, than those which had existed long before.

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Lord Mansfield,—For a long time, I was much averse to a determination of this point, in such a question, and between such parties. But, upon more consideration, I think we ought now to decide it. If there has been an abuse, we ought to stop it as early as possible. A delay might lead to a supposition that we doubt, where in truth we do not; and any subsequent inconvenience, in consequence of our supposed doubt, would be chargeable upon us. I remember, when I was *Attorney-General*, I was obliged to prosecute the minister of the *Savoy*, who insisted on the right of marrying without licence, and taking advantage of a dispute then subsisting between the Crown and the duchy of *Lancaster*, sheltered himself sometimes under the one, and sometimes under the other. He had married many couples in a year, and many children had been born under those marriages. But it was necessary to stop the abuse, even after it had gone so far; and he was convicted. Time, or the interposition of the legislature, may cure the marriages which have been already solemnized in this chapel[1]. The act clearly meant chapels existing at the time. It says church or chapel belonging to the parish or chapelry where the parties reside. There is no chapelry here.

[1] As soon as the determination of the court in this case was known, Lord [Beau]champ introduced a bill into parliament, which passed into a law, for [mak]ing all marriages which *had been* [cel]ebrated in any parish church or public chapel, erected since 26 *Geo.* 2. c. 33. and consecrated, valid in law, and to exempt the clergymen who had celebrated such marriages, from the penalties of that statute. *Vide* 21 *Geo.* 3. *c.* 53.

here. I am of opinion, that this marriage was void by the provisions of the statute.

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Both the orders quashed.

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The KING *against* PITTS.

Friday, 25th May.

An order of bastardy stating "when it hath appeared to us, &c." without an express adjudication that the person charged is the putative father, is void.

ON *Friday*, the 4th of *May*, *Bearcroft* obtained a rule to shew cause, why an order of bastardy made upon the defendant, by two Justices for the county of *Hereford*, and confirmed by the court of Quarter Sessions for that county, should not be quashed. The objections he then stated were; 1. That, in the caption, the two Justices were said to be "residing *near* unto the limits of the parish of, &c." and the words of the statute are, "in or *next* unto the limits, &c." (*a*); 2. That the order contained no *express* adjudication, and was therefore void; according to the case of *Rex* v. *Perkasse* (*b*).

On *Saturday*, the 19th of *May*, *Bower* shewed cause.

Upon examining the original order, it appeared, that the word in the caption was "*next*" and not "*near*;" and there remained, therefore, only the second objection to be considered. The order, was, in a great measure, in the same form with the precedent in *Burn's Justice* (*c*), but with the omission of the following clause:

"We, therefore, upon examination of the cause and "circumstances of the premises, as well upon the oath of "the said *A. B.* as otherwise, *do hereby adjudge* him the "said *C. D.* to be the reputed father of the said bastard "children."

Bower contended, that, as the statute of *Elizabeth* does not prescribe any particular form, if enough appears on the face of the order to authorize the act of the Justices in charging the supposed father, *that* is sufficient. The case in *Siderfin* is not so decisive as it would seem to be from the manner in which it is stated by *Burn* (*d*), for it appears, in *Siderfin*, that the objection on which the order was quashed, was, that the sum was unreasonably small (viz. 2*d*. *per* week,) and this point about the adjudication is mentioned *after* the decision, and, then, without any *positive* opinion of the court upon it. The same principle must govern with regard to orders of bastardy and orders of removal, and none of the determinations upon orders of removal will be found to warrant the present objection. In *Rex* v. *Westwood* (*e*), there was nothing in the

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(*a*) 18 *Eliz.* c. 3, § 2.
(*b*) *E.* 20 *Car* 2. 2 *Sid.* 363.
(*c*) 1 *Burn*, 189, 13th Ed.
(*d*) 1 *Burn*, 193, 13th Ed.
(*e*) *H.* 4 *Geo.* 1. 1 *Str.* 73. Bott 195.

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the order to supply the want of an express adjudication. The same observation applies to *Rex* v. *Minchinhampton (c)*, for it was not at all stated, there, that the pauper was likely to become chargeable. In *Stallinburgh* v. *Haxhay (d)*, the words only were, "*we do believe*;" in *Waltham Magna* v. *Waltham Parva (e)*, "*as we are credibly informed*," and, in *Berry* v. *Arundel (f)*, "*whereas complaint hath been made to us*." In the present case, the Justices have expressly said, "*whereas* "*it hath appeared to us, &c.*" and, in *Suddlecomb* v. *Burwash (g)*, Lord Holt said, *that* was sufficient; and the same thing was afterwards determined in a case of *Rex* v. *Darnal (h)*, mentioned in the Report of *Suddlecomb* v. *Burwash*.

Beaucroft, on the other side, insisted, that the adjudication is the most important, and an indispensable part of the order, and cannot be supplied by implication. [illegible], the court is not so strict, with regard to orders of Justices, as in the case of convictions, but still, it *must* appear, upon the order, that the Justices had an authority for what they did; and, without an adjudication they have no authority. They act both as jury and judges, and the order must contain both a verdict and judgment. In indictments founded on the *common law*, nothing can be supplied by inference; and *a fortiori*, nothing so material as the adjudication can be intended in the case of particular jurisdictions created by *statute*. If defects of this sort could be cured by intendment, no order would ever have been held to be bad. The court will pay regard to precedents long established, and approved: and this order, though framed after the precedent in *Burn*, has left out the most essential part. In *Rex* v. *Penkasse*, the rule to *shew cause* was granted on the objection as to the smallness of the sum; but it is clear, from an attentive perusal of the case, that the ultimate decision went upon the want of adjudication. Most of the cases cited in support of the order make against it; and there is a material difference between the case put by Holt, in *Suddlecomb* v. *Burwash*, and this case, for the case he puts is of a substantive declaration, "that it has ap-"peared, &c." and so probably the order ran in the case there referred to, of *Rex* v. *Darnal*; but, here, the words "*it hath appeared to us*," are coupled with the evidence [1], [664] and do not seem to differ, in meaning, from "*we do believe*," in *Stallinburgh* v. *Haxhay*, where the reason given for quashing the order was, (and which equally applies here,) "that a "man may believe a thing on uncertain evidence."

Buller,

(c) E. 3 Geo. 2. 2 Sess. Ca. 92. [illegible] 647. 3 Burn, 475, 13th Ed. Burr. [illegible] Ca. p. 316.
(d) T. 4 Geo. 1. 3 Burn, 475, 13th [illegible] 1 Sess. Ca. 131.
(e) E. 10 Geo. 1. 3 Burn, loc. cit.
(f) E. 9 W. 3. 1 Salk. 479.
(g) T. 13 W. 3. 1 Salk. 491.
(h) E. 2 Ann.
[1] They are so put in the case of *Suddlecomb* v. *Burwash*.

BULLER, *Justice*, having mentioned *Rex* v. *Gravesend* (a), stated in *Bott*,—where, according to his account of it, there was no adjudication of the birth of the child in the parish but under a "*whereas*," and the court held *that* to be sufficient,—the court deferred giving their opinion till there should be an opportunity of enquiring more fully into the circumstances of that case.

Lord MANSFIELD absent.

This day, his Lordship was in court, but not having heard the argument at the bar, the judgment was delivered by WILLES, *Justice*, to the following effect.

WILLES, *Justice*, (after stating the objection, and observing upon the cases of *Rex* v. *Perkasse*, and *Suddlecomb* v. *Burnash*),—The case of *Saint Giles's, Cripplegate* v. *Hackney* (b) seems to be more like the present than *Suddlecomb* v. *Burnash*. In that case, the *dictum* is as was stated by Mr. *Bower*; however, the report concludes, by saying "there "ought to be a particular averment, &c." and, in *Saint Giles's, Cripplegate* v. *Hackney*, the order runs very much in the same manner as here, *viz.* "whereas on oath made by the "said *E. F.* it appears that her husband was last legally "settled at *Hackney*;" and that order was quashed, "be-"cause there was no judgment of the Justices concerning the "last legal settlement, but only the oath of the woman" (c). We have looked into the proceedings in *Rex* v. *Gravesend*, and we find, that there was an *express* adjudication in that case. We are, therefore, all of opinion, that this order cannot be supported.

Both the orders quashed.

(a) *E.* 15 *Geo* 2. *Bott*. 104.
(b) *E.* 9 *Will*. 3. 1 *Salk*. 478.
(c) *Salk. loc. cit.*

[665]
Friday, 25th May.

BRISTOW *against* WRIGHT and PUGH, Sheriff of MIDDLESEX.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

IN last *Hilary Term*, on *Thursday*, the 25th of *January*, *Lee* obtained a rule to shew cause, why the verdict which had been found for the plaintiff should not be set aside, and a new trial granted, or a non-suit entered.

This was an action on the case, against the defendants as sheriff of *Middlesex*, on the statute of 8 *Ann*. c. 14. § 1. [☞ 1] for taking the goods of one *Pope* in execution, in a house let from year to year by the plaintiff to *Pope*, without paying

[☞ 1] That provision only extends to the immediate landlord of whom the tenant in possession holds, and not to a superior or ground landlord. M...

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paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice [☞ 2.]

The declaration stated the demise, as follows:

"The said plaintiff, on, &c. demised, to one *Benjamin Pope*, a certain messuage, &c. to have and to hold unto the said *Benjamin*, from the feast of St *Michael*, then next following, for and during the term of one year from thence next ensuing, and fully to be compleat and ended, and so, from year to year, for so long as it should please the plaintiff, and the said *Benjamin*, yielding and paying, therefore, yearly and every year during the said term, unto the plaintiff, the yearly rent or sum of, &c. *by four even and equal quarterly payments, to wit, at the Feast of, &c.*"

The principal witness called on the part of the plaintiff, was *Pope* himself; who proved, that the plaintiff let the house to him, by parol, for a year, and *that there was no stipulation about any time or times for the payment of the rent.*

It was contended, at the trial, (which came on before Lord MANSFIELD, at the Sittings for *Middlesex*,) that, as the plaintiff had laid a demise with a reservation of rent *payable quarterly*, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonsuited. His Lordship over-ruled the objection, being then of opinion, that enough of the demise as laid had been proved to entitle the plaintiff to his action. The present rule was moved for, on the ground of a misdirection.

On *Thursday*, the 3d of *May*, the *Attorney-General*, and *Dunning*, shewed cause, and urged, that the contract was not the *gist* of the action [☞ 1]; the material part was, that a year's rent was in arrear, and that having been proved, the plaintiff had shewn enough to entitle himself to a verdict.

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Wood, on the other side, insisted, that, as the plaintiff had set forth the particulars of the contract, he was bound to prove them as laid: and, for this, he cited;—An *Anonymous Case* in Lord *Raymond*, where a promise being laid, "to deliver *good* "*merchandizeable wheat*," and the evidence being of a promise to deliver "*good second sort of wheat*," Lord HOLT held the variance

ter *Bennet's* case, *B. R. M.* 1 *Geo.* 2. 2 *Str* 787.

[☞ 2] It should seem, in such a case as the present, that the court, on motion, would make a rule on the sheriff to pay the year's rent to the landlord. *Darling* v. *Hill*, *B. R. E.* 9 *Geo.* 2. *Ca. Temp. Hardw.* 255.

[☞ 1] In *White* v. *Wilson* 2 *B. & P.* 116, it was held that an averment may be material that is only laid as inducement; and that, being material, laying it under a *scilicet* will make no difference.

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variance to be fatal, and nonsuited the plaintiff(*a*);—*The King* v. *Nudigate*(*b*), where, upon a traverse of an office found, the issue being, whether *J. S.* devised "*to J. N. and* "*his heirs*" or not, and the jury having found that "*J. S.*" devised "*to A for years, remainder to J. N. in fee,*" the court adjudged "*quod non devisavit modo et forma,*" *Sands and Tash* v. *Ledger* (*c*), where, in an action of debt for rent, the plaintiffs declared on a demise, "*for £15 rent* "*per annum,*" under a power "*to make leases for twenty-* "*one years,*" and the evidence being of a demise "*for £15* "*rent per annum, and three fowls,*" under a power "*to* "*make leases for twenty-one years in possession, and not in* "*reversion, rendering the ancient rent, and not dispunish-* "*able of waste,*" Lord *Holt* directed a nonsuit,—And *Savage, qui tam,* v. *Smith,* which was afterwards stated by Lord MANSFIELD in delivering the judgment of the court (*d*).

The case stood over till this day.

Lord MANSFIELD, (after stating the case,)—I am very free to own, that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is extremely hard on the party to be turned round, and put to expence, from such mistakes of the counsel or attorney he employs. It is hard also on the profession. It was on this ground that I over-ruled the objection in this case; but I am since convinced, both on the authorities which I am about to mention, and, on the reasoning in them, that I was wrong, and that it is better, for the sake of justice, that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are precision and brevity. Nothing [*667] is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his grounds of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover [† 136]. If he states what is impertinent, it is an injury to the other party, and may be struck out, and costs allowed, upon motion [† 137]. I remember a case, where, in an action on one covenant, the whole of a very long deed was

(*a*) *Bedford* Assizes, 12 *W.* 3. 1 Ld. *Raym.* 735.

(*b*) *B. R. E.* 6 *Car.* 1. Sir *W. Jones*, 224.

(*c*) *Surry* Assizes, 1 *Ann.* 2 Ld. *Raym.* 792.

(*d*) *Infra*, p. 668.

[† 136] *Vide Dundass* v. Lord *Weymouth*, *B R. M.* 18 *Geo.* 3. *Coup.* 665.

[† 137] *Vide Price* v. *Fletcher*, *B R. H.* 18 *Geo.* 3. *Cowp.* 727. *Rex* v. *May*, *E.* 19 *Geo.* 3 *supra*, p. 193. *Rex* v. Lord *Waltham*, *T.* 25 *Geo.* 3.

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was set forth. The court referred it to the Master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of £100. When I say that the plaintiff needs only set forth that part of a deed on which his action is founded, I do not mean to say that even *that* is necessary. He is not bound to set forth the material parts, *in letters and words*. It will be sufficient to state *the substance and legal effect*. *That* is shorter, and not liable to misrecitals, and literal mistakes. Here, that method might have been followed. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, (which might have been struck out on motion,) and what cannot Where the declaration contains impertinent matter, foreign to the cause, and which the Master, on a reference to him, would strike out [r 2], (irrelevant covenants for instance,) *that* will be

[r 2] In *Peppin* v. *Solomons*, 5 *T. R.* 496, it was said by *Buller*, J. that the authority of this case had been sometimes doubted; but it was there maintained by the learned Judge (as well as that of *Savage*, *q. t.* v. *Smith*) on the ground that it was here *necessary* to state *some* contract between the plaintiff and his tenant, and that a contract being in its nature entire, must be stated accurately. See also *Drewry* v. *Twiss*, 4 *T. R.* 558, where a variance between the statement and the proof of a *tort* (by running down a boat in the half-way reach in the *Thames*, which was described in the declaration as a running down in the *Thames near the half-way reach*) was held to be immaterial. So, in *Williamson* v. *Allison*, 2 *East*. 446, which was in *tort* upon a warranty on the sale of goods, charged in the declaration to have been made falsely, fraudulently, and deceitfully, but there was no proof that the defendant *knew* of the defect; it was held not to be a fatal variance; Lord *Ellenborough*, and *Lawrence*, J. expressing their approbation of the distinction here established between immaterial and irrelevant averments.—In *Webb* v. *Herne*, 1 *B. & P.* 281, it was held, in escape against the sheriff, where the plaintiff had unnecessarily averred the arrest to have been by virtue of an affidavit, that he was bound to prove it by production of the affidavit. So also in *Turner* v. *Eyles*, 3 *B. & P.* 456, in a similar action against the warden of the *Fleet*, where the court doubted whether it were necessary to state a commitment to have been of record, they held clearly that, being so stated, it must be proved; and that evidence of a commitment by a single judge was insufficient to maintain the averment. See also the case of *Phillips* v. *Bacon*, 9 *East*. 298, in which much of the argument turned on the present question, though the decision was ultimately on another ground, the present case appears to have been misrepresented in that argument, as if it were an action upon the contract. See also *Purcell* v. *Macnamara*, *ibid.* 157, in which the doctrine is established, of allegations of substance, which need only be substantially proved; and allegations of description, which must be

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be rejected by the court, and need not be proved. But, if the very ground of the action is mis-stated, as where you undertake to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal. For then, the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present instance, the plaintiff undertakes to state the lease, and states it falsely.—There are many authorities which go to prove this distinction. I will mention three, (which are very strong,) where matter, which it was unnecessary to set forth, being stated, and not proved, the variance was held to be fatal. The first is the case of *Cudlip* v. *Rundle* (a). There, in an action by a lessor against his tenant, for negligently keeping his fire, by means whereof the house was consumed,—a demise to the defendant for seven years was stated in the declaration; the defendant pleaded, that the plaintiff did not demise *modo et formâ*; and issue being joined, it appeared, on the finding by the jury in a special verdict, to be a lease at will. The court agreed, that the action would have lain against the defendant as tenant at will; but, as the plaintiff had stated him to be a lessee for years, and had proved him tenant at will, the variance was held to be fatal, and there was judgment for the defendant. The next is the case of *Savage, qui tam* v. *Smith*, in the *Common Pleas* (b). That was an action of debt against a sheriff's officer, by an informer. The declaration stated a judgment, and a *fieri facias* upon that judgment.—The *fieri facias* was given in evidence, but not the judgment, and the court held, that, though it might be unnecessary to aver the judgment, yet, having been averred, it ought to be proved; and my Lord *Chief Justice* DE GREY expressly went upon the distinction between immaterial and impertinent averments, and said, that the former must be proved, because relative to the point in question [1]. The third case is *Shute* v. *Hornsey* in this court (c). That was an action for double rent on the statute (d). The declaration stated a lease

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(a) *B. R. T. 2 W. & M. Carth.* 202.

(b) *T.* 16 *Geo.* 3. 2 *Blackst.* 1101.

[1] By a mistake of the press, the word "*material*" is printed instead of "*immaterial*," in the report of this case in 2 *Blackst.* 1104. "*Immaterial*" certainly was the word used by *De Grey*, Chief Justice, as appears, not only from what is here said by Lord MANSFIELD, but also from a very accurate manuscript note I have seen of *Savage* v. *Smith*, and indeed from the context in *Blackstone*'s own report.

(c) *E.* 19 *Geo.* 3.

(d) 11 *Geo.* 2. *c.* 19. § 18.

be literally proved. See also the arguments in *Page* v. *Fry*, 2 *B. & P.* 240, in which the judgment of the court turned on another point.

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a lease for three years; but, on the evidence, it appeared, that the lease for three years was void, under the statute of frauds; and that the defendant was only tenant from year to year. This was sufficient for the purpose of the action; but a lease for three years having been laid, and not proved, the plaintiff was nonsuited; and a rule for setting aside the nonsuit having been obtained, it was, upon the argument of the case, discharged. These authorities are in point to the doctrine I have laid down. But perhaps, notwithstanding the weight of the cases, if that doctrine were highly detrimental, and the setting it right would be attended with no mischief, as it is only a mode of practice, it might deserve consideration. But I believe it stands right, and upon [669] the best footing; for it may prevent the stuffing of declarations with prolix unnecessary matter, because of the danger of failing in the proof; and it may lead pleaders to confine themselves to state the legal effect. We are all of opinion that the verdict should be set aside, and judgment of nonsuit entered.

The rule made absolute [† 138].

[† 138] *Vide Carlisle* v. *Trears*, *B. R. M.* 18 *Geo.* 3. *Cowp.* 671. *Vide*, also, *Moore* v. *Musgrave*, *Hob.* 18, but corrected in 1 *Roll. Abr.* 850, pl. 11. *Pope* v. *Skinner*, *Cam. Scacc.* *T.* 12 *Jac.* 1. *Hob.* 72. ☞ *Roberts* v. *Herbert*, *C. B. M.* 12 *Car.* 2. 1 *Sid.* 5. *Wyvill* v. *Shepherd*, *C. B. H.* 29 *Geo.* 3. *H. Bl.* 162. *Barbe* v. *Parker*, *C. B. M.* 30 *Geo.* 3. *H. Bl.* 284, which three last cases are instances of variations not held fatal, and it now seems settled, that the strictness required in this case of *Bristow* v. *Wright*, holds only in cases of *records and written contracts*. *Vide King* v. *Pippet*, *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 235, and *Gwinnett* v. *Philips*, *B. R. E.* 30 *Geo.* 3. 3 *Term Rep.* 643. In *Baker* v. *Edmunds*, *B. R. M.* 23 *Car.* 1. it was resolved, "that, in an action upon a *contract itself*, if the party mistake the sum agreed on, he fails in his action; but if he bring his action upon the promise in law, which arises from the debt," (the common case of *indebitatus assumpsit*,) "there, though he mistake in the sum, "he shall recover." *Alleyn* 28, 29, in *Smith* v. *Hickson*, *B. R. T.* 7 *Geo.* 2. Lord *Hardwicke* says, "in contracts it is necessary to prove all the charges in the declaration exactly in the manner they are laid." *Cases Temp.* Lord *Hardwicke*, 54, 55.

Friday, 25th May.

PAGET *against* WHEATE.

By the insolvent debtors' act of 18 *Geo.* 3. *c.* 52. the insolvent person is discharged as to bonds executed *before* the day in the act, but *not payable till after* the day.

ACTION of debt on a bond, executed at *Westminster*, on the 21st of *November*, 1777, for the penal sum of £250. The defendant, by his *plea*, confesses the debt; "But,—in pursuance of an act of parliament, *&c.* (18 *Geo.* "3. *c.* 52.) in *discharge of his person* from the execution of "the judgment to be obtained against him in that behalf by "the

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"the plaintiff, according to the form and direction of that "act,—says, that he was beyond the seas in foreign parts, "on the 10th of *March*, 1778, and was duly discharged, ac- "cording to the said act, at, &c. on the 3d of *November*, "1778; and further says that the said debt for which this "action is brought, *was contracted* before the 10th day of "*March*, 1778, to wit, &c. wherefore he prays judgment, "and that his person may be discharged from the execution "of the judgment to be obtained against him by the plaintiff "in this action, according to the form of the said act, &c." *Replication;* That the bond was made at the time and place in the declaration mentioned: Then sets forth the condition; which was, to pay £125 with lawful interest *on the 21st of November*, 1778: Then avers, that, after the making the bond, and after the said 10th of *March*, 1778, and before suing out the original writ, to wit, on the said 21st of *November*, 1778, in the condition mentioned, the said sum of £125 *first became due*, according to the tenor and effect of the said condition, and not at any time before: That the defendant had not paid it then, nor afterwards, but that it still remained unpaid; by reason of which said premises, the bond became forfeited, and the said debt and cause of action thereby and thereupon accrued, *after the said* 10*th of* [670] *March*, 1778.—*General Demurrer*.

The question in this case turned upon the construction of the words of the act of parliament, which are: "That, if "any action is brought against a person who has taken the "benefit thereof, for any *debt due before*, &c." he may plead, *in discharge of his person*, "that such debt, *was con-* "*tracted or due before*, &c. (*a*)."

The case was argued, on *Friday*, the 11th of *May*, by *Wood*, in support of the demurrer, and by *Law*, for the plaintiff.

Wood admitted, that the particular clause in the act on which the question here more immediately turned, and which directs the manner of pleading, is not very accurately penned; but he contended, that, if the whole act was taken together, it would be manifest that it was the intention of the legislature, that debts under the circumstances in this case, should be discharged by the act. This, he said, appeared clearly from the 37th section, which provides, that no person discharged by the act shall be imprisoned for any debt, bond, &c. contracted, incurred, occasioned, owing, *or growing due, before*, &c. and that, if arrested, such person shall be released by any Judge of the court out of which the process issued, or by two Justices of peace, &c.

Law, on the other side, insisted, that insolvent acts ought not to be construed with greater latitude in respect to the insolvent,

(*a*) 18 *Geo.* 3. *c.* 52. § 40.

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insolvent, than the bankrupt laws in respect of the bankrupt; and that a bond, made before bankruptcy, but not due till after, was not proveable under a commission, nor discharged by the certificate, till a statute was expressly made for that purpose (*b*). He observed, that the 37th section of the insolvent act only applies to the case of *prisoners*, not of *fugitives* like this defendant [1]; and contended that, till the day of payment, in the case of a bond, the debt does not exist.

Lord MANSFIELD said, he thought this very point had been determined upon some former insolvent act, and desired the case might stand over, to give an opportunity of enquiring if there had not been a decision upon it.

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And, now, his Lordship mentioned, that the very same question had occurred in a case of *Workman* v. *Leake*, and had been determined, *H.* 14 *Geo.* 3. (*c*) [† 139]; that by a note he had seen of that case, it appeared, that the court had held, that a debt due by a promissory note, though not payable till after the day in the act, yet was *debitum in præsenti*, and that, as such, it was discharged [F]; differing from a debt only payable on a contingency, which would not be discharged, unless the contingency had happened before the day; and that he had then mentioned, that he and the other Judges had been reminded of various instances where they had discharged from arrests, under similar circumstances to those of the case then before them.

Judgment for the defendant.

(*b*) 7 *Geo.* 1. c. 31. § 1, 2.

[1] By § 41. the statute may be pleaded to action on debts of *prisoners*, if contracted before the 28th of *January*, 1778, and of *fugitives*, if before the 10th of *March*, 1778. Yet, by § 37. provision is only made for the summary discharge from arrests for debts contracted *before the* 28*th* of *January*, 1778. This must have been a slip in drawing the act.

(*c*) 10th *Feb.*

[† 139] That case of *Workman* v. *Leake* has been since reported, *Cowp.* 22.

Saturday, 26th May.

BAILEY *against* WILKINSON.

The insolvency of the defendant having happened since the action brought, is good cause against judgment as in case of a nonsuit.

UPON a rule to shew cause, why there should not be judgment as in case of a nonsuit against the plaintiff, the cause shewn was, that the defendant had become insolvent since the action brought.

BULLER,

[F] The same point as that in *Workman* v. *Leake*, was determined in *Lord Kinnaird* v. *Barrow*, 8 *T. R.* 49, under the insolvent act, 34 *Geo.* 3. c. 69; in which the present case was also relied on as an authority.

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BULLER, *Justice*, said, he had known the rule for judgment as in case of a nonsuit, refused on this ground, in former instances; and that it would be extremely hard, if a party should be obliged to proceed, and put himself to expence, without a possibility of recovering either debt or costs.

Dayrell, for the plaintiff.—*Sutton*, for the defendant.

The rule discharged.

TARLTON *against* FISHER and Others.

Saturday, 26th May.

A sheriff or his officer is not liable to an action of false imprisonment, for arresting a certificated bankrupt, a peer, a discharged insolvent, or a person who took advantage of the statute of 20 *Geo.* 3. c. 64. made on the occasion of the prisons in *London* being burnt by the rioters, although the party, in such cases, is privileged from arrests.

THIS was an action of trespass, and false imprisonment. —The *declaration* contained two counts; 1. For imprisoning the plaintiff on the 27th of *November*, 1780, at *Bath*, in * *Somersetshire*, and detaining him in prison three days; 2. For imprisoning him at the same place, on the 29th of *December*, 1780, and detaining him eleven days.—The defendants *pleaded*; 1. Not guilty, upon which *issue* was joined; 2. To the *first* count, a justification, as sheriff's officers, under a writ of attachment out of the court of *Exchequer*, directed to the sheriff, and a warrant from him; 3. To the *second* count, a like justification, under a precept in the nature of a writ of *capias ad satisfaciendum*, from the court of requests in the city of *Bath*, directed to them as officers of that court.—The plaintiff *replied*; 1. To the justification pleaded in bar of the first count, that, before the time when, &c. in the first count mentioned, and before the making of the statute of 20 *Geo.* 3. c. 64. *viz.* on the 20th of *November*, 1779, he was arrested, under a writ of *latitat*, directed to the sheriff of *Somersetshire*; that, afterwards, before the time in the said count mentioned, and before the making of the act, *viz.* on the 3d of *February*, 1780, he gave special bail to the action, and, afterwards, before the time in the said count mentioned, and *after* the making of the act, and before the prisons of the *King's Bench* and the *Fleet*, respectively, were repaired, or other prison or prisons substituted in lieu thereof, respectively, and notice thereof given in the *London Gazette*, *viz.* on the 25th of *August*, 1780, he surrendered himself in discharge of his bail, before Lord MANSFIELD, and was, thereupon, committed to the custody of the marshal, that the tipstaff then tendered him to the said marshal; and that, in all things, he conformed to the rules and directions by the said act of parliament prescribed, concerning such prisoners who had surrendered in the manner in the said act mentioned; by reason whereof, and by force of the said act, at the time in the said count mentioned, and from thenceforth he had been, and still was, in the custody of the marshal,

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and

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and was not liable to be arrested by virtue of the writ in the said plea mentioned; *of all which premises the said defendants, at the time in the said count mentioned, had notice;* 2. Then a similar replication to the special plea in bar of the *second* count; and 3. A *new assignment* on the *first* count, of another assault and false imprisonment. To the replication [illegible] the first count, the defendants *rejoined,* that the plaintiff did not conform to the rules and directions by the act of parliament prescribed; on which rejoinder *issue* was joined; To the replication on the second count, they rejoined, that the plaintiff was not committed by Lord MANSFIELD to the custody of the marshal in discharge of his bail; on which *issue* was also joined; and to the new assignment, they pleaded the general issue.

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A general verdict having been taken at the Assizes, for the plaintiff, by mistake, *Morris* obtained a rule to shew cause, why the *Postea* should not be amended, and made agreeable to the notes of the Judge who tried the cause, by entering the verdict for the defendants on all the issues, except on so much of the general issue as related to the trespass mentioned in the first count, and on the issue [illegible]ned on the justification pleaded in bar to the first count; and *why the judgment should not be arrested.*

The court having heard the counsel upon the subject of the amendments, and perused the Judge's notes [† 140], *that* part of [illegible] was made absolute; and then the question on arresting [illegible] judgment was argued, by *Wood,* for the plaintiff, and *Morris* [illegible] *Batt,* for the defendants.

The question turn[illegible] upon the construction of the following words in the statute of 20 *Geo.* 3. *c.* 64. § 2.

"And *shall not be liable to be arrested* by virtue of any "civil process out of any court; and, in case they have been, "or shall be, so arrested, *shall be discharged therefrom* [1]."

For the defendant, it was argued, that the sheriff and his officers were bound to execute the process directed to them, and to keep the person arrested till they were satisfied of the truth of the surrender, and compliance with the regulations of the statute. It could not be the meaning of the legislature, that

[† 140] *Vide Eddowes* v. *Hopkins,* *E.* 20. *Geo.* 3. *supra,* p. 376. *Grant* v. *Astle, T.* 21 *Geo.* 3. *infra,* p. 722.

[1] This section of the statute only applies to persons who had been *actually in custody,* and set at liberty by the rioters. By § 6. *the same sort of surrender* as had by § 2. been prescribed as to *them,* is prescribed for persons [illegible]der circumstances like those stat[illegible] this plaintiff in his replica[illegible] and it says, [illegible] on *their* complying with the rules and directions prescribed by § 2. *the bail shall be discharged, and the defendants deemed and taken to be in actual custody;* but does not go on to add, "*and shall not be liable to be arrested.*" This difference between the two clauses [illegible] notice of on the argument of this case. I presume § 6. was considered as adopting, by implication, all the provisions of § 2.

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that the sheriff should *take upon himself the truth of those circumstances, upon the mere assertion of the party, or give implicit credit to the marshal's certificate [2]. The statute does not operate as a *supersedeas*, but, if a party will take advantage of it, the regular method is to apply to the court, where he may make an *affidavit* of the truth of the facts. The sheriff has no authority to put him to his oath. *Feme coverts* are, every day, discharged from arrests: but no action of trespass was ever brought in such cases; nor for arresting persons entitled to privilege. If in any such case, an action can be maintained, it must be *case*, not *trespass*, and *that* can only be against the party, not against the sheriff or officer; *Salmon* v. *Percival* (a), *Parsons* v. *Lloyd* (b), *Cameron* v. *Lightfoot* (c).

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On the other side, it was said, that the act had pointed out the means by which those who had surrendered might be known upon application to the marshal, as they were obliged to give him an account of their place of abode in writing (d), and the replication, in this case, expressly charged, *that the defendants had notice* of the surrender and discharge, *viz.* "of *all which premises, &c.*" In *Cameron* v. *Lightfoot*, the ground of the decision was, that the protection of a witness, or party, *eundo et redeundo*, is the privilege of the court, not of the person himself. It would have been a good return to the writ, that the party had conformed to the act, and so he could not arrest him.

Lord MANSFIELD,—This is a direct action of trespass, *quare vi et armis*, and not *on the case*; and there is this distinction between them, which always ought to be attended to: In *trespass*, innocence of intention is no excuse; in *case*, the whole turns upon it; malice, or the *quo animo*, is the very *gist* of the action. In this case, the notice is immaterial: for it is contended, that the arrest was illegal; and the question singly is, whether the sheriff must abstain, at his peril, from arresting any man who has taken advantage of the act. It is argued as if the discharge under the act operated as a *supersedeas*. But the doubt will be, not on the act, but on the party; whether he is within it. The sheriff must determine that question; he must decide whether the surrender was fraudulent,

[2] A practice had prevailed since the act passed for the marshal to deliver a certificate of the surrender and compliance with the directions of the act, to the party; but this is not prescribed by the statute. By the insolvent acts, the party is to be released from arrests, by a judge, or two justices, *upon shewing the copy of the order for his discharge*, 18 *Geo.* 3. *c.* 52. § 37. The marshal's certificate was probably thought of, from analogy to the copy of the order in that case.

(a) *B. R. T.* 6 *Car.* 1. *Cro. Car.* 196.

(b) *C. B. M.* 13 *Geo.* 3. 3 *Wils.* 341.

(c) *C. B. E.* 18 *Geo.* 3. 2 *Blackst.* 1190.

(d) § 2.

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fraudulent, before he discharges. There is no doubt but there was a fraud upon the act in this case. The plaintiff, an inhabitant of *Bath*, gives special bail before the riots, and then comes up to *London* to free his bail and himself. Could the legislature mean, * that every bailiff should judge, at his peril, whether the surrender and discharge were fraudulent? Whether the act had been complied with? It necessarily passed very precipitately, from the urgency of the circumstances. There is no direction how the discharge is to be, which, in the statutes relative to bankrupts and insolvents, is explicitly pointed out; but the expressions, "shall not be liable to be "arrested," and "shall be discharged," from the nature of the thing, mean, "shall be discharged by proper authority." The sheriff is not bound not to arrest. If he chooses to take the truth of the facts upon him, and not arrest the party, he may, and the surrender and compliance with the act will be a good return[† 141]; but he will be answerable. The case of *Cameron* v. *Lightfoot*, is material. It is, there, said, that privilege will not be allowed but in fair cases; and even then, trespass will not lie for the arrest. I am clear, that an action of trespass does not lie in this case, against the officers. Whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the case might be maintained, would be another question.

WILLES, *Justice*,—I own I have great doubts in this case. There are [illegible] provisions in the act; 1. That the party shall not *be liable* [illegible]. 2. That, if he is arrested, he shall be discharged. Under the first, I think trespass would not lie against an officer who ignorantly arrests a party who has taken the benefit of the act. But *that* is not the case here; for it is stated, that the defendants had notice at the time of the arrest. The party has no way of shewing, that he is not liable, but by producing the certificate of the marshal, which the sheriff and his officers are bound to take notice of, in the same manner as in the case of a *supersedeas*. Under the second provision, I think trespass might lie, if the party were detained longer than was necessary for making the proper enquiries; but, here, the plaintiff was only detained three days, which would be no more than reasonable time. But I lay my finger on the first part of the clause, which I think decisive, that the arrest was illegal; and there is a clear difference between illegal arrests, and arrests against privilege. Unless the certificate has the effect of a *supersedeas*, the first part of the clause is nugatory.

ASHHURST, *Justice*,—I think this action is not maintainable. A sheriff is bound to execute process issuing out of [illegible] court

[† 141] Such a return was held good in a case of *Inge* v. *Herrick*, *B. R. M.* 22 *Geo.* 3.

court of competent jurisdiction; and, though there be no *cause of action, or the process is erroneous, he is not responsible. The plaintiff himself, in such cases, is only liable to an action on the case for maliciously holding to bail. But it is unnecessary, here, to go into the question of what remedy there might be against the party. It would be extremely hard, indeed, upon a sheriff, or his officers, if they were bound to enquire into the truth of that exemption, and determine upon it at their peril. The notice alledged in this replication is mere form. But, supposing there was actual notice, were the defendants bound to give credit to the allegation of the party? Even if a certificate was shewn, I should doubt whether the officers would have been justified in discharging him. It is a plaintiff's business to take care how he takes out his writ. If he deliver it to the sheriff, he takes all upon himself. He may know, and take upon himself to prove, that the surrender, and other proceedings, were fraudulent; and shall the officer discharge the party on the production of a certificate, when the plaintiff has it in his power, perhaps, to shew fraud in obtaining it? If there were fraud, what defence could be set up to an action for an escape? The act could never mean, that every sheriff should send to *London* to enquire who had surrendered.

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BULLER, *Justice*,—This seems to me a very clear case. I do not feel the weight of the argument on the first part of the clause of the act. As to the discharge, express words would have been used, if it had been meant to vest new powers in the sheriff. The meaning must have been, to vest the power of discharge where, in other cases, it was vested before, *viz.* in the court out of which the process issued; or, in vacation, in one of the Judges. *That* satisfies the words of the act. In cases of bankrupts, or insolvents, what is done? Hundreds have been arrested, but there never was an instance of an action against the sheriff or his officers in such cases. The practice, in the case of bankrupts, is, to apply to a Judge, and verify the certificate by *affidavit* (a). How could the sheriff ascertain that the certificate was signed by the commissioners? He cannot administer an oath. In the case of insolvent debtors, the provisions for this discharge are somewhat different in words, but are, in substance, I think, the same. The party, there, is to be discharged, not by the sheriff, but by the order of a Judge, (or two Justices of the peace (b), and there are, in the insolvent acts, similar words to those of the first part of the clause in the statute now under consideration; for it is enacted, "that no person to be discharged by "the

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(a) *Vide* 5 *Geo.* 2. *c.* 30. § 13. (b) 18 *Geo.* 3. *c.* 52. § 37.

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"the act, *shall be imprisoned, &c.* (c);" so that, if this is to be considered as a positive injunction upon sheriffs not to execute process but at their peril, false imprisonment would lie in every case where an insolvent has been discharged by a Judge's order. The practice under the act in question is too recent to have much weight; but, as far as it goes, it is against the idea that sheriffs are to take upon themselves to discharge. Frequent applications have been made to Judges to discharge persons who had the marshal's certificate, and they have exercised their discretion in deciding whether the party was entitled to his discharge. I myself have often refused to do it, on the ground of collusion; and the court has declared, in particular, that, where the defendant has come from a remote county to surrender to the marshal, in order to defeat his *bona fide* creditors, the act will afford him no protection. The general law, as to sheriffs, is, that if a sheriff has acted in obedience to the mandate of the court, he is excused. If he arrest a peer, the writ is erroneous, yet he is not a trespasser for executing it. In trespass, the defendant must shew an excuse. Have the defendants done so in this case. Yes, for the mandate of the court was compulsory on them. The original plaintiff would not be liable to an action of trespass till the writ is superseded, for, till then, it is a justification: After a *supersedeas*, trespass will lie against the party; but still not against the sheriff. I take this to have been settled over and over again, and the inconvenience would be very great if the law were otherwise.

The rule made absolute

(c) *Ibid.*

Saturday, 26th May.

Butcher *against* Green.

When there are issues joined on several counts, and on some a verdict for the plaintiff, and on others for the defendant, the defendant shall not have costs on that part of the record on which the verdict is found for him [F 1].

THIS was an action on the case, in which there was one count *in trover*, and another *for words* [1].—Pleas; "*not*

[1] *Vide Dickson* v. *Clifton*, C. B. M. 7 Geo. 3. 2 *Wils.* 319, where it was determined, that case on the custom of the realm, against a carrier, and

[F 1] The settled practice of K. B. (to which that of C. B. was then made conformable) was declared in *Penson* v. *Lee*, 2 *B. & P.* 330, to be, where one issue

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"*not guilty*," to the first count; and a *justification* to the second.—Verdict for the plaintiff on the count for *trover*, and for the defendant on the other. The *Attorney-General* had obtained a rule to shew cause(*a*) why the Master should not tax the defendant his costs relative to the pleadings and proceedings on the second issue which was found for the defendant, and why what should be allowed to him on such taxation should not be deducted out of what should be allowed to the plaintiff on the first issue, in case the same should exceed the costs allowed to the defendant.

Wheeler now shewed cause, and cited *Astley* v. *Young* (*b*)

BULLER, *Justice*, said, the practice of this court had been uniform not to allow the defendant costs in cases of this sort. They differed, he said, from cases where different issues are joined on different pleas: for, in those cases, the defendant is allowed his costs on the issues found for him[2].

The rule discharged[3].

and trover, may be joined in one action, contrary to the old case of *Matthews* v. *Hopkins*, *B. R. E.* 17 *Car.* 2. 1 *Sid.* 244, and that the true criterion to know what counts can be joined, is, not whether they require the same plea, but whether there is the same judgment in both.

(*a*) On *Monday*, the 7th of *May*.

(*b*) *B. R. T.* 1 *Geo.* 3. 2 *Burr.* 1232.

[2] *Vide Cooke* v. *Sayer*, *B. R. H.* 32 *Geo.* 2. 2 *Burr* 753, where it appears, that this point was not then settled. If the issue is found for the plaintiff on a special plea, or there is judgment for him on a demurrer to such plea, he is to have costs[1 2] by the express provision of 4 *Ann.* c. 16. § 5. *Quære*, If that clause extends to cases where there is judgment for the plaintiff, on a demurrer to a special plea before the trial on the general issue, and, afterwards, a verdict for the defendant on the general issue. There is no exception of that case, in the statute. Yet, upon principle, and the reasoning of the court, in *Cooke* v. *Sayer*, the plaintiff ought not to have any costs in such a case, because it appears, ultimately, that he had no cause of action. ☞ If there are several issues on several special pleas of justification, and on the general plea of not guilty, all are found for the plaintiff, except one of the special justifications, which is found for the defendant, but afterwards held insufficient in point of law, so that the plaintiff has judgment, the plaintiff shall not have the costs on such issue found for the defendant. This was determined in *Kirk* v. *Nowill*, *et al.* *B. R. E.* 26 *Geo.* 3. 1 *T. R.* 266, 267.

[3] S. P. *Bridges* v. *Raymond*, *C. B. H.* 12 *Geo.* 3. 2 *Blackst.* 800, and *Norris* v. *Waldron*, *C. B. E.* 18 *Geo.* 3. 2 *Blackst.* 1199.

issue is on trial found for the plaintiff, he must have general costs, deducting only the costs of such parts of the pleadings, briefs, and witnesses, as are not applicable to the points on which the verdict proceeded. And it makes no difference if (as in the principal case) separate causes of action are laid in the separate counts: see an observation, *contra*, in a note to

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Spicer v. *Teasdale*, 2 *B.* & *P.* 50, which was corrected by the learned reporters, *ib.* p. 335. Otherwise, where the defendant pays money into court, on some counts, and it is taken out by the plaintiff: in that case the plaintiff is only allowed costs on the counts on which the money was paid in. *Baillie* v. *Cazalet*, 4 *T. R.* 579. So, where the defendant suffers judgment by default on one count, and takes issue on another, which is found for him, the plaintiff has only his judgment and costs on the first, and the defendant has his costs on the verdict found for him on the second. *Day* v. *Hanks*, 3 *T. R.* 654.

[F 2] And these costs, where they arise upon an issue found, are not only the costs of the pleadings, as on demurrer, but the costs of the trial also. *Brook* v. *Willett*, 2 *H. Bl.* 435, which case was reconsidered and confirmed in that of *Vollum* v. *Simpson*, 2 *B.* & *P.* 368.

The End of EASTER TERM, 21 GEORGE III.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE TWENTY-FIRST YEAR OF THE REIGN OF GEORGE III.

1781.

Friday, 15th June.

RUSHTON *against* ASPINALL.

In an action against the *indorsor* of a bill of exchange, if the plaintiff do not allege a demand, and refusal by the *acceptor*, on the day when the note was payable, it is error, and not cured by verdict.—*In* like manner it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal by the acceptor.

THIS case came on upon a writ of error from the court of the county palatine of *Lancaster*. It was an action of *assumpsit*. The first count in the declaration,—after stating, a bill of exchange drawn by one *Billinge* on one *Meyer*, dated the 27th of *November*, 1778, and payable to one *Jones*, or order, three months after date; that *Jones* had indorsed it to *Rushton*, and *Rushton* to *Aspinall*;—proceeded as follows:—" Which said bill of exchange so made, subscribed, " and indorsed as aforesaid, afterwards, to wit, on the same " day and year aforesaid, (*viz.* the day of the date of the bill,) " at *Manchester* aforesaid, was shewn and presented to the " said *Peter Meyer*, for his acceptance thereof, and the said " *Peter Meyer*, according to the usage and custom of mer- " chants aforesaid, *did* then and there *accept* the same, and

 " promise

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"promise to pay the said sum of £22. 10s. therein mentioned, *according to the tenor and effect of the said bill of exchange*, and the indorsements thereupon so made as aforesaid, yet the said *Peter Meyer*, although afterwards, to wit, *the same day and year aforesaid*, at *Manchester* aforesaid, requested to pay the said sum of money in the said bill specified, according to the tenor and effect thereof, and of his acceptance thereof so made as aforesaid, altogether neglected and refused, and still doth neglect and refuse to pay the same; of all which premises the said *John Jones*, *George Billinge*, and *Peter Meyer*, respectively, the same day and year aforesaid, at *Manchester* aforesaid, in the county aforesaid, had notice, and, *by reason thereof*, and according to the said usage and custom of merchants, the said *Thomas Rushton* became liable to pay to the said *Joseph Aspinall*, the said sum of money in the said bill of exchange contained, *according to the tenor and effect thereof*, and of the several indorsements so made thereon as aforesaid; and, being so liable, the said *Thomas*, afterwards, to wit, the *same day and year last mentioned*, at *Manchester* aforesaid, in the county aforesaid, in consideration thereof, undertook, and to the said *Joseph* then and there faithfully promised, to pay to him the said sum of money, in the said bill of exchange contained, according to the tenor and effect thereof, and according to the several indorsements made thereon as aforesaid."

The second count was for another bill for £60, drawn, indorsed, and accepted, by the same parties; and was framed in the same manner with the first.

The last count, which was upon an *insimul computasset*, concluded, that the said *Thomas* was found in arrear, and indebted to the said *Joseph*, in the further sum of, &c. "and thereupon, being so found in arrear and indebted as aforesaid, the said *Thomas*, in consideration thereof, afterwards, to wit, &c. undertook, and to the said THOMAS, then and there faithfully promised, *to pay to him* the said last sum, when he should be afterwards thereto requested."

There was a general verdict for the plaintiff, and, judgment being entered, the record was removed into this court, and the plaintiff in error assigned several errors on the different counts, but which contained only three objections: two to the two first counts, and one to the third: *viz.* 1. That it appeared by the record, that the bill was made on the 27th of *November*, 1778, payable *three months after date*, and that the payment was demanded of *Meyer*, on the *very same* 27th of *November*; whereas, *according to the tenor* of the bill, and the custom of merchants, it was not *payable, nor the payment demandable of Meyer*, until the expiration of three months after the date thereof: 2. That it did not appear that

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Rushton, to whom the bill was indorsed, and who indorsed it to *Aspinall*, had *any *notice* of the refusal of *Meyer* to pay the money in the bill mentioned, when the same was and became due, and had been demanded of him, "without which "notice, the said *Thomas Rushton*, as an indorsor of the said "bill of exchange, was not liable, by the law of this kingdom, "and according to the usage and custom of merchants afore-"said, to the payment of the money therein mentioned, as "such indorsor of the same bill:" 3. That, by the record, it appeared, that the promise of the said *Thomas Rushton*, mentioned in the last count, was made "to himself the "said THOMAS RUSHTON, and not to the said JOSEPH "ASPINALL; wherefore the said *Joseph Aspinall*, could "not have or maintain any action thereof against the said "*Thomas Rushton*."

In the last term, on *Friday*, the 25th of *May*, the case was argued by *Chambre*, for the plaintiff in error, and *Wood*, for the defendant.

Chambre abandoned the objection to the last count, but contended, that the other two were fatal.—1. The contract by the indorsor to pay the bill, was not absolute, he said, but conditional, *i. e.* in the event of a demand being made on the acceptor at the time [F 1] of payment, and his refusal. Such demand, therefore, must be made, in order to render the indorsor liable. It was a necessary circumstance to entitle the drawer to an action against him, and a plaintiff must in all cases state a sufficient cause of action in his declaration.—2. In like manner, the indorsor is not liable till after he has had notice of a demand having been made upon the drawer and of his [illegible] How soon such notice shall be given,—what shall, or shall not, be reasonable time for notice,—is a matter for the consideration of the jury [† 142]; but some notice must be given, and therefore ought to be alleged.

Wood argued, in answer to *both* objections, that the facts of the demand and notice being circumstances without which the jury could not have found for the plaintiff, they must now be presumed to have been proved, and that the omission to allege them in the declaration could not be taken advantage of after

[† 142] *Vide Russel* v. *Langstaffe*, *M.* 21 *Geo.* 3. *supra*, p. 514, 515. *Note* [† 110].

[F 1] So, where the acceptance is to pay at a particular place, the demand must be there made. *Saunderson* v. *Judge*, 2 *H. Bl.* 509.

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after verdict. For this he cited the case of *Hitchen* v. *Stevens* in *Shower (a)*, where, in an action of debt for rent by the bargainee of a reversion, after a verdict for the plaintiff, it was objected, in arrest of judgment, that the plaintiff had not alleged attornment, without which (as the law then stood) he could have no title; "but a rule was taken and agreed by "all the court, that, in any case where any thing is omitted "in the declaration, though it be matter of substance, if it be "such as without proving it at the trial, the plaintiff could not "have had a verdict, and there be a verdict for the plaintiff, "such omission shall not arrest the judgment [☞];" and thereupon, after solemn debate, judgment was given for the plaintiff. With regard to the *first* objection in particular, he contended, that the allegation, under a *videlicet*, that the demand of payment was made on the 27th of *November*, might be rejected as surplusage. This was no more than appeared to have been done in a case of *Sorrel* v. *Lewen*, reported by *Keble (a)*. There, in an action of *indebitatus assumpsit*, the promise was laid on the 1st of *January*, 26 *Car*. 2. which was a day not yet come, and, after verdict, it was held to be cured, because the verdict must have been found on evidence of a promise before the action, and a duty before the promise. And, as to the *second* objection in this case, although there was no allegation of notice to the indorsor, yet it was stated, that he *promised* to pay, after the acceptor had refused, which he could not be supposed to have done without a knowledge of the refusal by the acceptor.

Chambre, in reply, observed, that the rule mentioned by *Wood* could not extend so far as he would carry it, otherwise a writ of error could never be supported, in any case, after verdict. The court would intend, that facts imperfectly stated had been completely proved, but they never could presume, that a material fact, which was not at all stated, had been proved. The first objection would not be removed by rejecting the words stating the demand to have been on the day when the bill was drawn, for still, the declaration would remain without an allegation of a demand at the time when the bill became due. As to the *promise* by *Rushton*, *that* is only considered as inference of law, and no such inference arises, unless it appears by the preceding part of the declaration that he was liable; or, if it is taken as an actual promise,

(a) *B. R. M.* 34 *Car*. 2. 2 *Show*. 233.

[☞] In *Spiers* v. *Parker*, *B. R. H.* 26 *Geo*. 3. 1 *Term Rep*. 141. 145. *Buller*, J. said, "After verdict nothing "is to be presumed but what is ex"pressly stated in the declaration, "and is necessarily implied from those "facts which are stated. That is the "case where a feoffment is pleaded "without livery, for a livery is always "implied, because it makes a neces"sary part of a feoffment."

(a) *B. R. M.* 26 *Car*. 2. 3 *Keb*. 354.

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mise, yet it might have been made without notice of the refusal by the acceptor; and, if it was, no action could be maintained upon it, because, without such notice, there would be no consideration.

The court were prepared to have given judgment the last day of *Easter Term*, (*Monday*, the 28th of *May*,) but neither of the counsel in the cause being present when Lord MANSFIELD was obliged to go to the House of Lords, the cause stood over till this day.

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Lord MANSFIELD,—The two objections insisted upon, are, 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant, of the acceptor's refusal to pay. The answer was, that, after verdict, it must be presumed, that those facts were proved at the trial: and *our* wishes strongly inclined us to support the judgment, if we could. But, on looking into the cases, we find the rule to be, that, where the plaintiff has stated his title, or ground of action defectively or inaccurately,—because, to entitle him to recover, all *circumstances* necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,—it is a fair presumption, after a verdict, that they were proved [☞]; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption. The case cited from *Shower* comes within this distinction; for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, *that* being a necessary ceremony, it was presumed to have been proved. But, in the present case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were to be presumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promise [F 2] alleged to have been made by the defendant

[☞] S. P. *Rann* v. *Hughes*, *Dom. Proc.* 14 *May*, 1778, 7 *Br. Parl. Cases*, 550. & MSS.

[F 2] Such promise is raised by the law-merchant; and in cases where the law-merchant does not require notice, none is necessary to establish the liability, and support the promise arising upon it: Thus it is between indorsee and acceptor, where no *notice* of the *indorsement* is necessary. *Reynold* v. *Davies*, 1 *B. & P.* 625. That this doctrine is applicable to other actions, see *Blakey* v. *Dixon*, 2 *B. & P.* 321, and *Cook* v. *Pimhill*, 8 *East*. 173. See also *Machmurdo* v. *Smith*, 7 *T. R.* 518, a case under the calico printer's act,

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dant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn. I see, in a note of a case [1] in this court, in *Easter Term*, 18 *Geo.* 3. I am stated to have said; "A verdict will not mend the mat-"ter where the *gist* of the case is not laid in the declaration, "but it will cure ambiguity;" and there is a strong case in print of an action for keeping a malicious bull (*a*), where, the *scienter* having been omitted in the declaration, it was held bad after verdict. Therefore, we are all of opinion, that there should be judgment for the plaintiff in error.

The judgment reversed [† 144].

[1] *Avery* v. *Hoole*. It was an action against an unqualified person for using a gun. The declaration stated, that the defendant used a gun, *being an engine for the destruction of game*. In arrest of judgment it was objected, that it was not averred that the defendant *used* the gun for the destruction of game, but the court over-ruled the objection. Lord *Mansfield* observed, that, according to one way of pointing, the offence was sufficiently charged, and that such an ambiguity, though it might be a good cause of special demurrer, or an objection to a conviction, (as was held in a case of *Rex* v. *Hunt*, *E.* 15 *Geo.* 3.) was cured by verdict [† 143].

(*a*) *Buxendin* v. *Sharp*, *C. B. E.* 8 *W.* 3. 2 *Salk.* 662. 3 *Salk.* 12.

[† 144] In *Salomons* v. *Stavely*, *B. R. M.* 24 *Geo.* 3, which was an action on a foreign bill of exchange, the court held, on the authority of the precedent in *Dunstar* v. *Pierce*, *Lill. Entr.* 55, that the omitting to allege, in the declaration, a protest of the bill [F 3], is only matter of form, and cannot be taken advantage of on a general demurrer.—*Morgan*, for the plaintiff.—*Bower*, for the defendant.

[† 143] *Avery* v. *Hoole* has been since reported, *Cowp.* 825.

act, where it seems to have been somewhat relaxed, in favour of the operation of a verdict to supply the proof, not only of facts necessarily implied from those *stated* in the declaration, but of other facts necessary to the plaintiff's right to recover.

[F 3] But in *Gale* v. *Walsh*, 5 *T. R.* 239, it was held clearly, that it is necessary in an action against the drawer of a foreign bill, to prove protest for non-acceptance; unless under circumstances which would excuse *notice* of non-acceptance, such as want of effects of the drawer in the hands of the drawee.

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JONES and Another, Assignees of GARDINER, a Bankrupt, *against* BARKLEY.

Tuesday, 19th June.

Where something is [illegible] agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part.

THIS was a special action on the case, for non-performance of an agreement.

The first count of the *declaration*,—after reciting that the plaintiffs, as assignees of GARDINER, were entitled to the equity of redemption of £1490, Bank stock, which was in mortgage to one *Lane* for securing a sum of money lent by him to the bankrupt, and that the defendant was desirous that this equity of redemption should be assigned to *Lane* by the plaintiffs, and that they should execute, to *Lane*, a general release of all claims and demands which they, as assignees, had upon him,—stated the agreement to have been,—" That, on " *Gardiner's* having his certificate confirmed by the *Lord* " *Chancellor*, and the plaintiffs assigning to *Lane*, or any " person he should appoint, so far as in them lay, the equity " of redemption of the said capital stock mortgaged to the " said *Lane*, and also executing to him a general release of " all claims, and demands, which they, as assignees, had on " him, the defendant should pay, and promised to pay, (four " months after the certificate should be confirmed by the " *Chancellor*, and on *the plaintiffs' assigning the equity of* " *redemption*, as aforesaid, of the said stock, to *Lane*, or any " person he should appoint, and *executing* and delivering " such general release,) the sum of £611, to the plaintiffs, " *for the benefit of the creditors* of the bankrupt."—Then, after stating, that, in consideration of the promise and undertaking of the plaintiffs to perform all their part of the agreement, the defendant promised and undertook to fulfil all his part of it, the plaintiffs averred, " That, afterwards, *viz.* on " the 19th of *July*, 1774, the bankrupt's certificate was al- " lowed and confirmed by the *Chancellor*; that the plaintiffs, " at all times since the making of the agreement, had been " ready and willing, and at the expiration of four months from " the time of the certificate being confirmed by the *Chan-* " *cellor*, *viz.* on the 20th of *November*, 1774, *offered* to the " defendant, to *assign*, as far as in them lay, the said equity " of redemption, &c. and to execute and deliver to the said " *Lane* a general release, &c. and did, then and there, *tender* " to the defendant, a *draft of such assignment and release* to " the said *Lane*, for his the said defendant's approbation " thereof, and did, then and there, *offer to execute and deliver*, " and would, then and there, have executed and delivered, to " the said defendant, such assignment and release, but that the

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" said

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"said defendant, then and there, *absolutely discharged the* "*plaintiffs* from executing the same, or any assignment or "release whatsoever;—Yet the defendant not regarding, &c. "did not, four months after the said certificate had been con- "firmed by the *Chancellor*, nor, at any time before, nor since, "although often requested, pay the said sum of £611, or any "part thereof, to the plaintiffs."—There was another count nearly to the same purpose.

The defendant *pleaded*, 1. The general issue. 2. To the *first* count, "That the said plaintiffs did never execute an as- "signment of the said equity of redemption, to the said *Lane*, "or any person he appointed, and a general release to the "said *Lane*, of all claims and demands which they, as as- "signees, had on him, at the time of making the agreement, "and deliver or tender such assignment and general release so "executed, to the said *Lane*, or the said defendant." 3. A like plea to the *second* count.

To these special pleas the plaintiffs *demurred*, and shewed for cause, in the demurrer to the plea to the *first* count, that the defendant had not, by his plea, traversed or denied, or attempted to put in issue, any matter of fact alleged by the plaintiffs, but had introduced and attempted to put in issue matters of fact not alleged, nor necessary to be alleged, and that the plea was no answer to the said first count, but evasive and argumentative; and the same to the plea to the *second* count.

Le Blanc, for the plaintiffs,—The averment of the plaintiffs, in the declaration, is equivalent to an averment of a performance of their part of the agreement, and, if it is, the plea is bad. 1. Wherever a man, by doing a *previous* act [F 1], would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuses to permit him to do it, he acquires the right as completely as if it had been actually

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[F 1] This is the utmost that was decided by this case: here no contingency, but the immediate death of the party tendering the act, could have disappointed its performance: and being done, the party doing it would *instantly* have acquired, without any farther act, either on his own part or that of any one else, a full right by the terms of his contract to the duty demanded, *i. e.* the payment of the money. Otherwise, where the act tendered would, if completed, only have amounted to an *endeavour* to entitle the party tendering it to the duty claimed, which endeavour would be subject to be defeated by contingencies. *Per Cur.* in *Smith* v. *Wilson*, 8 *East*. 437, where the breach of covenant alleged was non-payment of freight, &c. and the plaintiff averred an offer to complete the voyage, (which had been interrupted by particular circumstances) and it was held that the *performance* of the voyage was a condition precedent.

actually done; and, if the tender is defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance, which he has occasioned. Thus, it is laid down by Lord *Coke*, "That, if a man make a feoffment in fee upon condition that the feoffee shall re-infeoff him before such a day, and, before the day, the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and, therefore, shall never take advantage for non-performance thereof (*c*)." In *Lancashire* v. *Killingworth*, which is reported by Lord *Raymond* (*d*), and in other books (*e*), the plaintiff declared on a covenant by the defendant's testator, that, upon two days notice to be given to the testator to accept £1000, *Hudson's Bay* stock, at the *Hudson's Bay House*, in, &c. and *upon* the transfer thereof to him, he would pay the plaintiff £2000, and the plaintiff averred, that he gave notice, and was ready there, at the day, and offered to transfer the stock, but that the testator did not come to accept it: This was held ill upon demurrer, because the plaintiff did not aver a refusal by the other party, or that he staid till the last hour of the day, and the other did not come; but Lord *Holt* said, "That, "though the money were payable *upon* the transfer, yet, if a "*legal tender* had been made by the plaintiff, he would have "been as well entitled to the money, as if he had made an "actual transfer." So, in *Blackwell* v. *Nash* (*f*), which was debt for a penalty, the plaintiff declared, that he covenanted to transfer to the defendant, on or before the 21st of *September*, so much stock, and that the defendant, *in consideratione præmissorum*, covenanted to accept and pay *for it*, and then averred, that he was at the books the 21st of *September*, & *paratus fuit & obtulit* to transfer to the defendant, who, then and there, refused to accept, or pay. On demurrer, it was objected, that this was a condition precedent, and, therefore, to entitle himself to the action, the plaintiff ought to have shewn an actual transfer of the stock; but the court held that the expression "*in consideratione præmissorum*," meant. in consideration of the covenant to transfer, and not of an actual transfer, but that, *if* it had meant an actual transfer, *a tender and refusal* would amount to a performance. Both of these cases prove, that the refusal of the defendant excuses the non-performance, and completes the tender. In the case of *Peter*

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(*c*) *Co. Litt.* 206. *b*.

(*d*) *B. R. T.* 13 *W.* 3. 1 *Ld. Raym.* 686.

(*e*) *Com.* 117. 12 *Mod.* 529. 2 *Salk.* 623.

(*f*) *B. R. M.* 9 *Geo.* 1. 1 *Str.* 535.

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Peter v. *Opie*, reported by *Ventris* (*g*), and *Saunders* (*h*), the same principle is to be found. *That* was *assumpsit*, on an agreement between the plaintiff and the defendant, that the plaintiff should pull down two walls, and build a house, *&c.* for the defendant, and that the defendant should pay him, *pro labore suo in & circa divulsionem*, &c. £8, and that, in consideration that the plaintiff assumed to perform his part, the defendant assumed to perform his, and the plaintiff averred, *that he was ready and offered* to perform all on his part, but that the defendant had not paid him the money. After verdict, the defendant moved in arrest of judgment, because there was no averment of performance or tender. But the court, after several arguments, and a discussion how far the words "*pro labore*" made a condition precedent, held, that this was good after verdict. Now, the utmost that could be implied after the verdict, was the *refusal* on the part of the defendant; for such an implication comes under the distinction in the rule on which a late case was decided (*i*), being only a circumstance attending the facts on which the plaintiff's title was founded; but, if nothing but *performance* would have done, then the very ground of action was not averred in the declaration, and *that*, according to the same rule, could not have been implied after verdict. To the same effect is a case stated in *Rolle's Abridgment* (*k*), from the Yearbooks (*l*), where, the condition of a bond being to raise a mill, the obligor came to the obligee, and said, all is ready to erect the mill, and asked when he would have him come with it and put it up, and the obligee answered, that he would not have it, and discharged him entirely of the mill. *That* was held to excuse him from the performance. And, in the same book (*m*), it is laid down, that, if a condition be, that [688] the son of the obligor shall serve the obligee seven years, if he tenders his son, and the obligee refuses, or takes him, and, within the term, commands him to go away, the bond will not be forfeited. In like manner, where money is to be paid, tender and refusal is constantly held to be equivalent to performance. But, if it is said, that the tender in the present case was defective, and incomplete, still that cannot avail the defendant, because he has made it good by waver, having discharged the plaintiffs from doing any thing farther. That such a waver may make good a *defective tender*, is proved by many authorities, and, particularly, by the case of *Austen* v. *The Executors*

(*g*) *B. R. M.* 23 *Car.* 2. 1 *Ventr.* 177. 214.

(*h*) 2 *Saund.* 350.

(*i*) *Rushton* v. *Aspinall*, *supra*, p. 679.

(*k*) 1 *Roll. Abr.* 453. *N. pl.* 5.

(*l*) 3 *Hen.* 6. 37.

(*m*) 1 *Roll. Abr.* 455. *R. pl.* 1. Q. *pl.* 1.

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Executors of Sir William Dodwell (n), where, on a question whether interest should be allowed on a mortgage after an alleged tender of the principal, it appeared, that the plaintiff had tendered a bank bill to one of the executors, for him to take, out of the amount of it, the principal and interest then due. The executor refused to take it, and the plaintiff asking if he objected to the legality of the tender, and saying, that if he did, he would presently turn the bill into money, he answered, that he did not; upon which, Lord KING held, that the tender in a bank-note was not, strictly speaking, a legal tender, but, since it was proved that the defendant offered to turn it into money, *that* made it a good tender. Now, here, there was the most compleat waver of the irregularity, by the discharge, from executing any assignment or release whatsoever. 2. What I have hitherto submitted to the court, is upon the supposition, that the execution of the assignment and release was a condition precedent; but I shall now contend, that there is no condition precedent in this case, but that this is one of those middle agreements in which what each has undertaken to do, is to be performed at the same time. There are no words necessarily importing priority here, as, "*for*, in *consideration* of, *proinde*," &c. but the agreement is, that the one party is to do an act, *on* the other's doing another. *Turner* v. *Goodwin* (o), reported in 10 *Modern*, is a case extremely applicable on this distinction. That was an action of debt upon a bond, by the condition of which, after reciting that *A*. was indebted to the plaintiff in a bond of £3000, conditioned for the payment of £1500, and had recovered judgment for that money, it was declared, that the defendant, upon consideration that the plaintiff would forbear suing out execution upon *A*. promised to pay the money, upon request, to the plaintiff, "he *assigning over* to him the "judgment he had against *A*." The defendant pleaded, that the plaintiff *had not assigned* the judgment; to which the plaintiff replied, "That he was *ready* to assign, and requested the defendant to pay the money, which he refused (p)," and, to this replication, the defendant demurred. It was contended on the part of the defendant, that the words, "he assigning," &c. made a condition precedent. The case was argued several times, and there was, on the first argument, a difference of opinion, but, at last, judgment was given for the plaintiff, which could not have been, if the court had not held, that the assignment was not a condition precedent [2]. It may be said that

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(n) *Canc. H.* 1729. 1 *Eq. Cases Abr.* 318. *pl.* 9.

(o) *B. R. E.* 12 *Ann.* 10 *Mod.* 153.

(p) 10 *Mod.* 190.

[2] This case of *Turner* v. *Goodwin*, as stated in *Viner's Abridgment*, vol. 20. p. 183, pl. 9, is still more in point to the present, for, there, the words are, "*upon* his assigning a judgment." But *Viner* cites the case from a book of still less authority than 10 *Mod. viz.* 2 *Barnard.* 308.

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that 10 *Modern* is not a book of authority; but there is a recent case in this court which confirms the doctrine there laid down, and the distinction, stated to have been taken by Lord MACCLESFIELD. The case I allude to, is that of *Kingston* v. *Preston*, determined in *E.* 13 *Geo.* 3.

"It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated;—That, by articles made the 24th of *March*, 1770, the plaintiff, for the considerations therein-after mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercer, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and, *from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house.*—Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, &c. and execute such deeds of partnership, and, further, that the plaintiff should, and would, *at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly, to the defendant,* in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to £4000.—Then the plaintiff *averred,* that he had performed, and *been ready* to perform, his covenants, and assigned for *breach* on the part of the defendant, that he *had refused to surrender and give up his business, at the end of the said year and a quarter.*—The defendant pleaded, 1. That the plaintiff did not *offer* sufficient security; and, 2. That he did not *give* sufficient security for the payment of the £250, &c.—And the plaintiff demurred generally to both pleas.—On the part of the plaintiff, the case was argued by Mr. *Buller*, who contended, that the covenants were mutual and independant, and, therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff, in a separate action. On the other side, Mr. *Grose* insisted, that

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" the covenants were dependant in their nature, and, there-
" fore, performance must be alleged: The security to be
" given for the money, was manifestly the chief object of the
" transaction, and it would be highly unreasonable to construe
" the agreement, so as to oblige the defendant to give up a
" beneficial business, and valuable stock in trade, and trust
" to the plaintiff's personal security, (who might, and, in-
" deed, was admitted to be worth nothing,) for the perform-
" ance of his part.—In delivering the judgment of the court,
" Lord MANSFIELD expressed himself to the following
" effect: There are three kinds of covenants: 1 Such as are
" called mutual and independant, where either party may re-
" cover damages from the other, for the injury he may have
" received by a breach of the covenants in his favour, and
" where it is no excuse for the defendant, to allege a breach
" of the covenants on the part of the plaintiff. 2. There are
" covenants which are conditions and dependant, in which the
" performance of one depends on the prior performance of
" another, and, therefore, till this prior condition is perform-
" ed, the other party is not liable to an action on his cove-
" nant[☞]. 3. There is also a third sort of covenants, which
" are mutual conditions to be performed at the same time;
" and, in these, if one party was ready, and offered, to per-
" form his part, and the other neglected, or refused, to per-
" form his, he who was ready, and offered, has fulfilled his
" engagement, and may maintain an action for the default of
" the other; though it is not certain that either is obliged to
" do the first act.—His Lordship then proceeded to say, that
" the

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[☞] *Vide Duke of St. Alban's* v. *Shore*, *C. B. T.* 29 *Geo.* 3. *H. Bl.* 270. 279, 280, where a rule laid down in *Boone* v. *Eyre*, *viz.* that where a covenant goes to the whole of the consideration on both sides, it is a condition precedent, was adopted and confirmed[F 2].

[F 2] See *Glazebrook* v. *Woodrow*, 8 *T. R.* 366. *acc:* Where this case of *Kingston* v. *Preston*, is referred to by *Grose* and *Le Blanc*, Justices, as a leading authority on the construction of covenants as dependant or independant. The converse of this proposition was also maintained in *Campbell* v. *Jones*, 6 *T. R.* 570, where the covenant sued upon was to pay £500, and the covenant which the defendant relied upon was a covenant that he, the plaintiff, would instruct the defendant in bleaching, *and* permit him to bleach in the same manner, during the continuance of his (plaintiff's) patent.—Defendant demurred to the declaration, because it did not state that plaintiff had so instructed him; but the court thought it not a condition precedent.

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"the dependance, or independance, of covenants, was to be "collected from the evident sense and meaning of the par-"ties [F 3], and, that, however transposed they might be in "the deed, their precedency must depend on the order of "time in which the intent of the transaction requires their "performance. That, in the case before the court, it would "be the greatest injustice if the plaintiff should prevail: The "essence of the agreement was, that the defendant should not "trust to the personal security of the plaintiff, but, before he "delivered up his stock and business, should have good secu-"rity for the payment of the money. The giving such secu-"rity, therefore, must necessarily be a condition precedent.— "Judgment was accordingly given for the defendant, because "the part to be performed by the plaintiff was clearly a condi-"tion precedent."

But, it is equally clear, that, in the present case, the agreement falls within the third class, as defined by Lord MANSFIELD, and, therefore, absolute performance by the plaintiff was not necessary to entitle him to his action, nor had he occasion to aver any thing further than that he was ready to assign the stock, and grant the release.

Wood, for the defendant,—The plaintiff's part of this agreement was a condition precedent [† 145]. There cannot be

[† 145] *Vide Boone* v. *Eyre*, *C. B.* *T.* 19 *Geo.* 3. 2 *Blackst.* 1312, where it was held, that, if one party covenants to do one thing, the other *doing* another, it is a mutual covenant, and not a condition precedent.

[F 3] *Acc. per Cur.* in *Hotham* v. *E. India Company*, 1 *T. R.* 638. It was there held that a ship owner might recover in covenant against the freighters for short tonnage, notwithstanding a covenant that no such claim should be allowed, unless it should be found upon a survey taken at the end of the voyage, by persons appointed between the parties; of which last covenant no mention was made in the declaration: The court, considering it in the nature of a defeasance, or condition subsequent, to be shewn by the defendants as matter of defence, if they meant to rely on it. See also *Morton* v. *Lamb*, 7 *T. R.* 125, as to the necessity of averring readiness at least in the declaration, to do the plaintiff's part, (where something is to be done *by both parties* to a contract *at the same time)*, in order to entitle him to recover against the defendant for not performing his part. But this need not amount to an actual *tender* to do an act, which the party was not bound to perform, to entitle him to claim performance from the other party. *Rawson* v. *Johnson*, 1 *East*. 203, where the action was for non-delivery of malt at a certain price, on request; and it was held, that an averment that the plaintiff made the request, and was *ready* and willing to receive and pay for the malt, but that the defendant refused to deliver it, was sufficient, without stating an actual *tender* of the money.

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be a more emphatical term to express priority of performance, than the word "*upon*." The general principle is true, that tender and refusal is sufficient, but the plaintiffs ought to have done every thing they had engaged to do, as far as was in their power, without any concurrence of the defendant; and, after that, if they had tendered to compleat their part, and the defendant had refused his concurrence, such tender and refusal would have been equivalent to a performance. These plaintiffs had not proceeded so far. They might have executed a release, and tendered to deliver it to the defendant; for as it was not required by the agreement that it should be such a release as the defendant should approve of, they might have gone that far without his concurrence. But instead of doing so, they only tendered a draft of a release. It was the more necessary they should perform every thing in this case which they had bound themselves to do, as far as they could without any hindrance from the non-concurrence of the defendant, because there is no express mutual promise on their part to execute the release, so that the defendant could not have brought an action against them for not doing it. The two following cases are directly in point. *Viz.* 1. *Austin* v. *Jervoyse* (*q*), where the plaintiff declared, that he had bought a horse of the defendant for *twenty-two shillings* paid in hand, and for £11. more to be paid at the death, or marriage, of the plaintiff, for which *he should become bound, with sufficient surety, by their writing obligatory*, and that the defendant, in consideration thereof, promised to deliver him the horse, when he should be required, and then averred, that afterwards, *he offered to become bound to him*, but yet defendant had not delivered the horse, though he had been required so to do. On *non assumpsit* pleaded, there was a verdict for the plaintiff, but the judgment was arrested, because he had not averred that he had tendered the obligation sealed, nor stated what security he had offered: 2. An *anonymous* case in *Rolle*'s Reports (*r*), where, in an action on a bond conditioned for the delivery of a release on a certain day to the plaintiff, the defendant pleaded, that he was ready, on the day, to seal and deliver the release, that it was written, and the wax fixed to the label, but the plaintiff refused to accept of it. The plaintiff demurred: And it was laid down, by CHAMBERLAINE, *Justice*, that if a defendant is bound to do a thing which cannot be done without the plaintiff, and the plaintiff refuse to accept it, there the defendant is discharged if

(*q*) T. 13 *Jac.* 1. *Hob.* 69. 77.

(*r*) B. R. M. 20 *Jac.* 1. 2 *Roll.* 238.

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if he does what is in his power, but, that, in that case, the defendant had not done all he could, for he ought to have sealed the release without the plaintiff, which he had not done. The same principle is to be gathered from the * determination in *Blandford* v. *Andrews*(s); for, there, in an action on a bond conditioned for the defendant's procuring a marriage by such a time between the plaintiff and one *J. P.* the defendant pleaded, that the plaintiff had gone to *J. P.* and abused her, and told her, that, if he married her, he would tie her to a post, by reason whereof, the defendant could not procure the marriage by the time stipulated, and the plaintiff having demurred to the plea, it was held to be bad, because the defendant had not alleged, that he had used his endeavour to procure the marriage, and he ought to have shewn there was no default in him, and that he did as much as in him lay to procure it. Both this case, and *Austin* v. *Jervoyse*, are recognized by Lord HOLT, as law, in that of *Lancashire* v. *Killingworth*(t). With regard to *the payment of money*, if the person who is bound to pay should bring money in bags, and say to the other, "Here, I am ready to pay you the money," and the other should discharge him, surely that would not be sufficient, but he still ought to make an actual tender of the money. This was expressly adjudged in the case of *Suckling* v. *Coney*(u). As to the authorities relied on for the plaintiffs, they do not come up to the present case. In *Lancashire* v. *Killingworth*, a tender of the transfer, and refusal by the defendant, would have been sufficient, because the plaintiff could not have gone farther without the concurrence of the defendant.—(Lord MANSFIELD, "Yes, he might transfer stock without the presence of the other party.")—The case of *Peter* v. *Opie* was *after verdict*, and therefore does not establish what is, or what is not good, *upon demurrer*. In the case stated by *Rolle*, from the Yearbooks, the plaintiff could not have come upon the defendant's premises, to erect the mill, without his concurrence. The tender of the bank-note, in *Austen* v. *The Executors of Dodwell*, was equivalent to a tender of cash, especially, being accompanied with an offer to turn it into money.

Le Blanc, in reply, admitted, that, unless there were a discharge by the other party from going farther, the plaintiff must take every step necessary for him to do, in which the defendant's concurrence is not requisite, before he can avail himself of a refusal by the defendant; but that none of the cases

(s) B. R. M. 41 El. Cro. El. 694.

(t) 1 Ld. Raym. 687.

(u) Noy, 74.

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cases cited went so far as to controvert his posittion, that, where the defendant stops the plaintiff by the way he may take advantage of it. The case of *Blandford* v. *Andrews* was he said, the strongest, but, in that case, there was only an averment that the defendant *paratus fuit*, and then particular facts stated, from which an inference was to be drawn, that the plaintiff, by his conduct, had rendered it impossible for him to perform the condition; but no allegation of an express discharge by the plaintiff. As to the payment of money, in the case put of its being in bags, if the other party said, " I admit the money to be there, but I won't have it," he thought that would be a sufficient tender.

Lord MANSFIELD,—If ever there was a clear case, I think the present is. One needs only state what the agreement, tender, and discharge, were, as set forth in the declaration. It charges, that the plaintiffs offered to assign, and to execute and deliver a general release, and tendered a draft of an assignment and release, and offered to execute and deliver such assignment, but the defendant absolutely discharged them from executing the same, *or any assignment and release whatsoever*. The defendant pleads, that the plaintiffs did not actually execute an assignment and release; and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shewn to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs from executing it [F 4].

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The defence arises upon an objection to the declaration, and, therefore, the defendant should have demurred to it, and not have lengthened the record unnecessarily by two special pleas. None of the cases cited by Mr. *Wood* apply. The case in *Hobart* is very distinguishable from the present, for there was no refusal nor *discharge* in that case; the defendant was perfectly passive, and the plaintiff did not perform what he had undertaken, although there was nothing

[F 4] So, in *Hotham* v. *The East India Company*, *supra cit.* where another covenant was, that the allowance for short tonnage should not be made, unless the ship-owner procured a certificate from the freighter's agents at the commencement of the voyage, the court held a demand and refusal of such certificate sufficient.

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nothing to prevent him. In the case of *Blandford* v. *Andrews*, the defendant had agreed to use his endeavours, and, notwithstanding what had been done by the plaintiff, he might have prevailed *on the woman, before the time elapsed, to marry him. The questions on tenders are very different from this. They have arisen, not upon what shall excuse, but on what is, a tender. If the party pleads a tender, he must prove one. But the decision would have been very different in the cases of that sort, if there been any act of the one party stated on the record, which had prevented the other from making a compleat tender. The cases cited by Mr. *Le Blanc* are very strong on the present point. In *Kingston* v. *Preston* the principle is clearly laid down, that, where something is to be performed by each party at the same time, he who was ready, and offered to do his part, may sue the other for not performing his. I am sure there have been other cases since, of the same sort.

Judgment for the plaintiff [3].

[3] At the Sittings, at *Guildhall*, after this term, the cause was tried before Lord *Mansfield*, on the general issue, and a verdict found for the plaintiff, with £611 damages, but subject to the opinion of the court on a motion for a nonsuit.

The material facts, as reported by his Lordship, in *M.* 22 *Geo.* 3. (*a*), when the rule for a nonsuit came to be argued, were as follows:—An agreement, as stated in the first count, was entered into, and signed by the defendant; afterwards, *Gardiner's* certificate was allowed, and, a year after that allowance, the attorney for the plaintiffs, by their direction, prepared a draft of an assignment and release, and, in company with one of the plaintiffs, tendered it to the defendant for his perusal, telling him the plaintiffs were ready, and would execute it, if he approved of it. The defendant returned the draft, saying it was needless for them to give themselves any trouble, for that *Lane*, (who was the bankrupt's father-in-law, and for whom the defendant acted as an attorney,) would never pay the money. The witness who proved the tender, said, upon his cross-examination, that *Carr*, who was one of the plaintiffs, was a most obstinate creditor, and by much the largest, that his debt was £1200, and he persuaded him to sign, by telling him, that if he did not, the money would never be received. As soon as he had signed, the certificate was allowed. At the trial, the *Attorney-General* objected, that it appeared upon the evidence, that this was an agreement to secure the payment of money due from the bankrupt, in order to induce a creditor to sign his certificate, and, therefore, was void, under 5 *Geo.* 2. *c.* 30. § 11. His Lordship, at the trial, thought this case not within the statute, because the £611, to be paid to the plaintiffs, was not for the separate use of *Carr*, but for the benefit of *all the creditors*.

Dunning, and *Le Blanc*, argued for the plaintiffs, and contended, that this objection should have been taken on the demurrer, because the agreement, as proved, was stated on the record, and, if illegal, the plaintiffs had not shewn

(*a*) On *Thursday*, the 15th of *November*.

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shewn a good cause of action. But they also insisted, that it was not within the sense or intent of the statute. The object of that act, like that of all the other bankrupt laws, was to procure an equal distribution of the bankrupt's effects among all his creditors. This general object ought to be kept in view in construing them all, and the agreement in this case tended to secure an equal distribution, and therefore promoted the policy of the statutes.

The *Attorney-General*, *Lee*, and *Wood*, on the other side, insisted, that the objection did not arise upon the record, the circumstances under which *Carr* had signed not being stated in the declaration. As to the objection itself, it was clearly founded in *the words* of the statute, which were general enough to extend to the case of a security for money given to all the creditors, and also within the *mischief* meant to be provided against; for the design of the act was to prevent creditors from taking advantage [696] of the bankrupt's situation, or practising on the compassion of his relations, in order to extort money as a price for doing what, it is true, they are not compellable to do by positive law, but what there is a moral duty upon them to do voluntarily, if the bankrupt has fairly delivered up his whole property for their behoof. For this they cited a case of *Smith* v. *Bromley*, decided by Lord *Mansfield*, at *Guildhall*, at the Sittings after *E.* 1760 (*a*).

The court took time to consider, and on *Saturday*, the 24th of *November*, Lord *Mansfield* delivered their opinion in favour of the defendant.

His Lordship said, he well remembered the case of *Smith* v. *Bromley*, and that *Buller*, Justice, had a very good note of it, which he desired he would read, and which he accordingly did, to the following effect:—

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'Action for money had 'and received to the 'plaintiff's use; upon 'this case: The plain-'tiff's brother having 'committed an act of bankruptcy, 'the defendant, being his chief cre-'ditor, took out a commission against 'him; but, afterwards, finding no di-'vidend likely to be made, refused to 'sign his certificate. But on frequent 'application, and earnest entreaties, 'made by the bankrupt to one *Oliver*, 'a tradesman in town, who was an 'intimate friend of the defendant, who 'lived in *Cheshire*, he got *Oliver* to 'write to the defendant several times, 'and he at last prevailed on the de-'fendant to send him, (*Oliver*,) a 'letter of *attorney*, empowering him 'to sign the certificate, which *Oliver* 'would not do, unless the bankrupt, 'or somebody for him, would advance '£40, and give a note for £20 more, 'and which, on *Oliver*'s signing the 'certificate for the defendant, the 'plaintiff, (who was the bankrupt's 'sister,) paid, and gave to *Oliver* ac-'cordingly, who thereupon gave her 'a receipt for the money, promising 'to return it, if the certificate was 'not allowed by the *Chancellor*. The 'certificate was allowed. The plain-'tiff afterwards brought her action 'against *Oliver* to recover back the '£40 from him, but, that action 'coming on to be tried before Lord '*Mansfield*, at *Guildhall*, at the Sit-'tings after last *Trinity Term*, and it 'then appearing that *Oliver* had ac-'tually paid over, or accounted for, 'the £40 to *Bromley*, and his Lord-'ship being clearly of opinion, that 'this action would not lie against the 'plaintiff's own agent, who had ac-'tually applied the money to the pur-'pose for which it was paid to him, the 'plaintiff

(*a*) Mentioned *Law of Nisi Prius*, p. 132, Ed. 1775.

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'plaintiff was nonsuited in that action; and 'now she brought this 'action against *Bromley* himself; which 'coming on to be tried, 'it was proved, that the money was 'received by *Oliver*, and paid over to 'the defendant.

'It was contended for the plaintiff, 'that this money was paid, either 'without consideration, or upon one 'that was illegal, and, in either case, 'was recoverable back by this action.

'For the defendant, it was argued, 'that there was certainly a considera'tion for the payment of the money, '*to wit*, the signing of the bankrupt's 'certificate; That, if this considera'tion was illegal, the plaintiff was '*particeps criminis*, had paid it volun'tarily and knowingly, and without 'any deceit, and so was within the 'case of *Tomkins* v. *Bernet*, (*H.* 5 '*Will.* 3. at *N. Pr.* before *Treby*, 'Chief Justice, 1 *Salk.* 22.); but that 'there was nothing illegal in it; for 'it was the money of a third person, 'and so no diminution of the bank'rupt's effects, or fraud upon his cre'ditors; in which case only, whereby 'the distribution becomes unequal, is 'there any iniquity in receiving a 'consideration for signing the certifi'cate; That, if the legislature had 'intended that money paid upon such 'consideration should be considered as 'illegally paid, they would have made 'it part of the clause in 5 *Geo.* 2. 'c. 30, which makes void bonds, bills, 'and other securities given for this 'purpose (*b*), in the same manner as, 'in the statute against gaming (*c*), 'there is an express provision for the 'recovering back of money lost at 'play (*d*) [☞]; That courts of jus'tice had always construed *that* 'clause of 5 *Geo.* 2. *c.* 30, in a strict 'manner, as appeared by the case of '*Lewis* v. *Chase*, *Canc. E.* 1720, 1 '*P. Will.* 620, and which case, as to 'the merits, seemed to be less fa'vourable for the creditor, 'than the present; for, [697] 'there, the bankrupt him'self, not the third person, gave a 'bond for the whole debt, in consi'deration of a creditor's withdrawing 'a petition he had preferred to the 'great seal against the allowance of 'the bankrupt's certificate; That, in 'the present case, if there was any 'guilt, the plaintiff was more guilty 'than the defendant, for he had receiv'ed very little towards his debt, which 'was £1150. That, if the plaintiff 'had become security for her brother 'the bankrupt, before the act of 'bankruptcy, the defendant might 'have received the money of her, 'without any imputation; and that, 'if a third person afterwards volun'tarily paid what she might before 'have become bound for, without any 'hurt

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(*b*) § 11.

(*c*) 9 *Ann. c.* 14.

(*d*) § 2.

[☞] By that statute the loser may recover the money lost, within three months after the loss. If he does not sue for and recover it within that time, any person may recover the sum lost, and treble the value. But it has been held, that the limitation of three months is confined to the case of money actually paid at the time, but that if a bond or other security is given, and the money, or part of it afterwards paid, a court of equity will compel the repayment of that money to the loser, after the expiration of the three months. *Rawden* v. *Shadwell*, *Canc.* 1755. *Ambl.* 269. The reason there stated to have been given by Lord *Hardwicke* is, that the *security* being void by 9 *Ann. c.* 14. the payment under such security cannot be supported. But, *Qu.* because by that statute the *contract* also is not made void. *Vide infra*, 743. By 16 *Car.* 2. *c.* 7. § 3. if the loss at one sitting is more than £100, the *contract* itself is made void, and in *Rawden* v. *Shadwell*, the bond was for £500.

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'hurt to the bankrupt's other creditors, there was no iniquity in the creditor's taking the money, so as it did not amount to his whole debt.

'But Lord *Mansfield* was of a different opinion. He said, it was iniquitous and illegal in the defendant to *take*, and, therefore, it was so to *detain*, this £40. If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive, and, whether it was the bankrupt or his sister that paid the money, it is the same thing. The taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itself, before any provision was made against it by statute; for, if the bankrupt has conformed to all the law requires of him, and has fairly given up his all, the creditor ought, in justice, to sign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud, or concealment, the creditor ought not to sign, for any consideration whatever. If any near relation is induced to pay the money for the bankrupt [F 5], it is taking an unfair advantage, and torturing the compassion of his family: if it is the money of the bankrupt himself, it is giving one creditor his debt to the exclusion of the others, and a fraud upon them. As to the case cited from *Peere Williams* [F 6], *that* only affected the person who petitioned.

[F 5] In *Howson* v. *Hancock*, 8 *T.R.* 575, Lord *Kenyon* says, the ground on which the action was maintained in the present case was, "that the money had been paid under a species of duress and oppression; and the parties were not in *pari delicto*."

In *Leicester* v. *Rose*, 4 *East.* 372, Lord *Ellenborough* seems to consider it doubtful whether this reason is the proper ground for the decision; and that the *real* principle must be, the fraud upon other creditors.

[F 6] In *Cockshott* v. *Bennet*, 2 *T. R.* 763, *Buller*, J. refers to this of *Smith* v. *Bromley*, as shaking the authority of *Lewis* v. *Chase*, and establishing the point there decided; viz. that a security for the residue of a debt, given by an insolvent debtor to one creditor, for the purpose of inducing him to join the rest in accepting a composition, was a fraudulent security, and could neither itself be the ground of an action, nor a valid consideration for a subsequent promise to pay the residue of the debt. So also a promise to give an additional *security* for the same debt, if made with the insolvent debtor as a condition of executing an agreement to accept debts by instalments, and in fraud of the other creditors, who are thereby induced to join in executing such agreement, is a void promise. *Leicester* v. *Rose*, *suprà cit.* and in which a case of *Feise* v. *Randall*, 6 *T. R.* 146, which seems *contrà*, was over-ruled.

In *Jackson* v. *Lomas*, 4 *T. R.* 166, the same two grounds of oppression upon the insolvent, and fraud on the other creditors, were relied on by the court, to invalidate a private agreement by one creditor for payment of his whole debt, and further security for its discharge, in consideration of which, he consented to sign a trust-deed: although in that case many of the creditors had signed the deed before the creditor in question. So, in *Nerot* v. *Wallace*, 3 *T. R.* 17, a promise by a friend of a bankrupt to pay certain monies received by the latter and unaccounted for, in consideration that the assignees and commissioners would forbear to examine him further concerning the same, was held to be void.

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'titioned. There might 'have been sufficient of 'the creditors in num- 'ber and value to sign 'without him, and he 'had a right to compro- 'mise it upon what terms he pleased. 'The petitioning, or not, was entirely 'in his own power, and not like the 'present case. It is argued, that, as 'the plaintiff founds her claim on an 'illegal act, she shall not have relief 'in a court of justice. But she did not 'apply to the defendant or his agent 'to sign the certificate on an improper 'or illegal consideration: but, as the 'defendant insisted upon it, she, in 'compassion to her brother, paid what 'he required. If the act is in itself 'immoral, or a violation of the gene- 'ral laws of public policy, there, the 'party paying shall not have this ac- 'tion; for where both parties are 'equally criminal against such general 'laws, the rule is, *potior est conditio* '*defendentis*[F 7]. But there are other 'laws, which are calculated for the 'protection of the subject against op- 'pression, extortion, deceit, &c. If 'such laws are violated, and the de- 'fendant takes advantage of the plain- 'tiff's condition or situation, there 'the plaintiff shall recover, and it is 'astonishing that the Reports do not 'distinguish between the violation of 'the one sort and the other. As to 'the case of *Tomkins* v. *Bernet*, it has 'been often mentioned, and I have 'often had occasion to look into it; 'but it is so loosely reported, and 'stuffed with such strange arguments, 'that it is difficult to make any thing 'of it. One book says it was deter- 'mined by Lord *Holt*; another, by 'Lord *Treby*. Certain it is, it was 'only a *Nisi Prius* case. I think the 'judgment may have been right, but 'the reporter, (*Salkeld*,) not properly 'acquainted with the facts, has re- 'course to false reasons in support of 'it. The case must have been, as I 'take it, an action to recover back 'what

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[F 7] This distinction was quoted and enforced by the court, in *Williams* v. *Hedley*, 8 *East*. 378; and in conformity to the principle derived from it, it was there decided, that money paid by a defendant to an informer to compound a penal action, might be recovered in an action for money had and received against the informer; the prohibitions of 18 *Eliz.* c. 5. s. 4, being confined to the informer or plaintiff in the action compounded, and designed for the protection and benefit of the party informed against. So in *Jaques* v. *Withy*, 1 *H. Bl.* 65, the court held, that money paid to a lottery office keeper for insuring tickets, contrary to stat. 19 *Geo.* 3. c. 21, might be recovered.

The inference to be drawn from the various decisions that have taken place on this subject, stated here and in the notes to *Lowry* v. *Bourdieu*, *supra*, 468, appear to be, that, the general principle remaining, that *in pari delicto potior est conditio possidentis*, the two following exceptions to its application are also established.

1. That where the illegality exists in the contract itself, and that contract is not executed, there is a *locus pænitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party.

2. That where the law that creates the illegality in the transaction was designed for the coercion of one party, and the protection of the other, or where the one party is the principal offender, and the other only criminal from a constrained acquiescence in such illegal conduct, in these cases there is no parity of *delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may at any time resort to the law for his remedy, though the illegal transaction be completed.

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'what had been paid, in part of principal and legal interest, upon an usurious contract; and, therefore, the action would not lie, for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who, from mere necessity, pays more than [698] the other can in justice demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall *retain*; though it is in order to prevent this oppression and advantage taken of the necessity of others, that the law has made it penal for him to *take*! This kind of reasoning is equally applicable to the case of a bailiff who takes garnish money from his prisoner. It is wrong for the bailiff to take it, and it is therefore wrong for the other to tempt him, and *volenti*, *&c.* and therefore he shall not recover it back; but this has been determined otherwise. The case of money given to a solicitor to bribe a custom-house officer, cited in that of *Tomkins* v. *Bernet*, is against his own agent, and, therefore, he cannot recover. But the present is the case of a transgression of a law made to prevent oppression, either on the bankrupt, or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother. This does not depend on general reasoning only, but there are analogous cases; as that of *Astley* v. *Reynolds*, (*B. R. M.* 5 *Geo.* 2. 2 *Str.* 915). There, the plaintiff having pawned some goods with the defendant for £20, he refused to deliver them up, unless the plaintiff would pay him £10. The plaintiff had tendered £4 which was more than the legal interest amounted to; but, finding that he could not otherwise get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered [☞]. It is absurd to say, that any one transgresses a law made for his own advantage, willingly. Put the case, that a man pawns another's goods; the right owner might be obliged to pay more than the value, and would have no relief, if this action will not lie. As to the case of usury, it was decided both by Lord *Talbot*, and Lord *Hardwicke*, in the case of *Bosanquet* v. *Dashwood* (*a*), on a bill brought to compel the defendant to refund what he had received above principal and legal interest, that the surplus should be repaid. Upon the whole, I am persuaded it is necessary, for the better support and maintenance of the law, to allow this action; for no man will venture to *take*, if he knows he is liable to *refund*. Where there is no temptation to

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[☞] If a party pawn goods on an usurious loan, he cannot recover back the goods on trover, unless he has first tendered the money really advanced, and, I presume, legal interest. *Fitzroy* v. *Gwillim*, *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 153.

(*a*) *Canc. M.* 8 *Geo.* 2. *Ca. Temp. Talb.* 38.

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'to the contrary, men 'will always act right. 'The jury, under his 'Lordship's direction, 'found a verdict for the 'plaintiff, with £40 da-'mages (b).'

After *Buller*, Justice, had read the note of the above case, Lord *Mansfield* expressed himself to the following effect.

Lord *Mansfield*,—I adhere, and all the rest of the court agree, to all the doctrine there laid down. Though the case in *Peere Williams* should be right, it is different from this, and is not within the letter of the statute, because it did not relate to the signing of the certificate, but to the withdrawing a petition against allowing it, and there had been a recovery upon the bond at law; and the report says, relief was refused, because, where both have equity, he who has the law must prevail, and that the defendant had equity, because he was a fair creditor. I doubt the reasoning, because a fair creditor has no right to take an undue and illegal advantage; but, certainly, so far was true, that, if the bond was void in equity, it was void in law. What struck me, in this case, at *Guildhall*, was, that the agreement was with the assignees acting for *all* the creditors, and the benefit to go to all the creditors. I thought, between a friend of the bankrupt and all the creditors, any agreement might be made; they might agree to supersede the commission; they might agree to compound. But, upon fuller consideration, I am satisfied; and we are all of opinion, that this case is within the letter of 5 *Geo.* 2. c. 30. and within the reason of it. Great corruption and oppression might arise from a combination of all the creditors, to exact conditions for signing the certificate.

The rule was made absolute, for a nonsuit to be entered [† 146].

(b) In a case of *Clarke* v. *Shee*, *M.* 15 *Geo.* 3. [† 147] Lord *Mansfield*, in delivering the opinion of the court, laid down, and enforced, the same doctrine as in this case of *Smith* v. *Bromley*. *Vide* also, *supra*, p. 472.

[† 146] *Vide Jacques* v. *Golightly*, *C. B. E.* 16 *Geo.* 3. 2 *Blackst.* 1073. *Browning* v. *Morris*, *B.R. E.* 18 *Geo.*3. *Cowp.* 790.

[† 147] Since reported, *Cowp.* 197.

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Friday, 22d June.

HYDE *against* COGAN and Others.

If persons riotously assembled, in part demolish and pull down a dwelling-house, and, *at the same time*, destroy goods and furniture in the house, although such goods and furniture were not destroyed *by means* of the pulling down of the house, *the Hundred* is liable, under 1 *Geo.* 1. c. 5. to yield damages for the destruction of the furniture as well as of the house.

BY the statute of 1 *Geo.* 1. *st.* 2. *c.* 5. commonly called the *riot act*, it is made felony without benefit of clergy, "for any persons unlawfully, riotously, and tumultuously, assembled together, to the disturbance of the public peace, unlawfully, and with force, to demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship, certified and registered according to the statute of 1 *W.* & *M.* *sess.* 1. *c.* 18. *or any dwelling-house, barn, stable, or other out-house (a).*"

And, by another section of the same statute (b), it is enacted, that, "if any such church or chapel, or any such building, &c. or any such dwelling-house, barn, stable, or out-house,

(a) § 4.

(b) § 6.

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out-house, shall be demolished, or pulled down, wholly, or in part, by any persons so unlawfully, riotously, and tumultuously, assembled, the inhabitants of the hundred in which *such damage shall be done*, shall be liable *to yield damages* to the person or persons injured and damnified by such demolishing or pulling down, wholly or in part, and such damages shall and may be recovered, by action to be brought in any of his Majesty's courts of record at *Westminster*, by the person or persons damnified thereby, against any two or more of the inhabitants of such hundred; such action for damages to any church or chapel, to be brought in the name of the rector, vicar, or curate, of such church or chapel, that shall be so damnified, in trust for applying the damages to be recovered, in rebuilding or repairing such church or chapel." (The damages recovered to be levied on the inhabitants of the hundred, in the manner prescribed by the statute of 27 *Eliz. c.* 13. in the case of actions against the hundred, by persons robbed.)

In consequence of the riots in *June*, 1780 *(c)*, various actions were brought on this statute, and in several of them, a question arose, how far the indemnity was meant to extend; whether it was confined to the loss sustained in the building merely, and the necessary and direct consequences of its demolition, or whether it was intended to reach, also, such damages as arose from the destruction of furniture, and other property, by the rioters, at the time when they were employed in demolishing the building itself. In three of those cases, special verdicts were found, with the view of bringing the question to a solemn determination. One of them was an action in the *Common Pleas*, by *Wilmot*, one of the Justices of the peace for *Middlesex*. The two others, *viz. Maberly* v. *Sergeaunt*, and this which I am about to report, were in the *King's Bench*. *Hyde* was also a Justice of the peace, and had been one of the most active magistrates during the riots. The defendants, in all the three actions, were inhabitants of the Hundred of *Ossulston*, in which the city of *Westminster* is situated.

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In this case of *Hyde* v. *Cogan*, the declaration contained *four* counts. The *first* charged, "That, after the last day of *July*, 1715, (the day from which the act took effect,) and within twelve months before the exhibiting of the plaintiff's bill [1], divers persons, *to the number of twelve and*

(c) Supra, p. 435.

[1] By § 8. of the riot act, "no person shall be prosecuted by virtue of this act, *for any offence* or offences committed contrary to the same, unless such prosecution be commenced *within twelve months* after the offence committed." This provision seems only to extend to *criminal prosecutions* for the felony, yet the above part of the form of the declaration is framed on an idea that the *action* against the hundred must be brought within a year. *Qu.*

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and more [2], being, then and there, unlawfully, riotously, and tumultuously, assembled, demolished and pulled down part, *to wit,* the walls, doors, floors, tyling, roof, timber, ceilings, partitions, windows, window frames, window shutters, hearths, chimneys, and chimney pieces, of a dwelling-house of the plaintiff, situate and being, *&c.* and in the said hundred of *Ossulston,* of great value, to wit, of the value, &c. in contempt of his present Majesty, and to the great damage of the plaintiff, and against the form of the statute, *&c.* whereby, and by force of the said statute, an action had accrued to the plaintiff, being the person injured and dammified thereby, to recover against the defendants, then and still being inhabitants of the said hundred, his damages, by him sustained by the demolishing and pulling down *his said dwelling-house, as aforesaid.*"

The *second* count was for demolishing and pulling down part, *to wit, &c.* of a dwelling-house, " together with divers goods, chattels, and furniture, *to wit, &c.* (enumerating various sorts of furniture, bedding, plate, cloaths, liquor, *&c.*) then and there being in the said last-mentioned dwelling-house of the plaintiff, and wherewith the said last-mentioned dwelling-house was, then and there furnished, in contempt, &c. whereby, *&c.* an action hath accrued, &c. to recover, *&c.* his damages by him sustained, by demolishing and pulling down *the said part of his said dwelling-house.*" The *third* was, in other respects, the same with the first, but concluded as the second. The *fourth* was like the second, except that it concluded thus, " to recover, *&c.* his damages by him sustained " by demolishing the said part of his said last-mentioned " dwelling-house, *and the said goods and chattels* of the said " *William, then and there being* in the same last-mentioned " dwelling-house."

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The cause was tried before ASHHURST, *Justice,* and the special verdict found: That divers persons, to the number of twelve and more, *&c.* did in part demolish and pull down the dwelling-houses of the plaintiff, in the second and fourth counts mentioned, and that the said persons, being so riotously and unlawfully assembled as aforesaid, did also, " *at the same time,*" demolish *the goods, chattels, and furniture* of the plaintiff in those counts respectively mentioned, *then being in the said dwelling-houses* of the plaintiff in those counts respectively mentioned; and, further, *that the said goods, chattels, and furniture were not, nor was any part thereof*

[2] It is not perfectly clear, from the penning of the act, whether it is necessary that there should have been *twelve or more rioters,* in order to entitle the party injured to this *action.* According to the most obvious construction, that number is *not* necessary to constitute *the felony* created by § 4.

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thereof destroyed by means *of the pulling down and destroying of the said dwelling-houses, or either of them.* Then there was a general assessment of the damages, "by reason of the "pulling down and destroying in part of the said dwelling-"houses in the *second* and *fourth* counts," at £1090; a *special* assessment for damages in respect of *the chattels, the goods, and furniture* in the same counts, at £883 3s.; and a general acquittal on the *first* and *third* counts.

The words "*at the same time*," in the verdict, had been substituted, by consent, before the argument, on the motion of *Baldwin*, in the room of "*then and there.*"

The finding in the case of *Maberly* v. *Sergeaunt*, was, *mutatis mutandis*, the same as here, except that, instead of saying the goods were not destroyed *by* "*means of*, &c." it was said they were not destroyed *in consequence* of pulling down the house.

Baldwin, for the plaintiff, insisted on the authority of the case of *Radcliffe* v. *Eden*, decided by this court in *Michaelmas Term*, 1776 [† 148]; and of *Wilmot* v. *Horton*, in which, after two solemn arguments, the court of *Common Pleas* had given judgment, the last term for the plaintiff [3].

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[† 148] Since reported, *Cowp.* 485.

[3] The following is a note of Lord *Loughborough's* argument, in delivering the opinion of the court in that case.

This is an action against two of the inhabitants of the Hundred of *Ossulston*, in the county of *Middlesex*, to recover damages for the destruction of the plaintiff's dwelling-house, furniture, and garden, by a number of persons riotously assembled on the 7th of *June* last, to the number of twelve and more. The action is founded on the 6th section of 1 *Geo.* 1. *st.* 2. *c.* 5. The object of that statute is expressed in the title—"An act for preventing "tumults and riotous assemblies, and "for the more speedy and effectual "punishing the rioters."—As a part of this general object, by the sixth section an action is given to the persons whose houses shall be demolished or pulled down, wholly or in part, against the inhabitants of the hundred, who are made liable to yield damages to the persons injured and damnified by such demolishing or pulling down, wholly or in part. All those damages which may be referred to the destruction of the fabric of the house, the plaintiff is admitted to be entitled to recover; but a doubt having arisen, whether he was entitled to any damages which did not fall under that description, the jury have found their verdict specially, in these terms:—That, upon the 7th of *June*, divers persons, to the number of twelve or more, did unlawfully, riotously, and tumultuously assemble themselves together, to the disturbance of the public peace, and, being so assembled, did, then and there, unlawfully, and with force, demolish and pull down part of the dwelling-house of the plaintiff, and did, *at the same time*, break to pieces and demolish, in the same dwelling-house, the goods and furniture of the plaintiff, then being therein, to the value of £700, and then carried the same to the public highway, and set fire thereto, and totally consumed the same: and there is a similar finding with respect to the damage done to the garden of the plaintiff, *viz.* that, *in pulling down and demolishing the dwelling-house*, they did damage to the *garden* of the plaintiff, then and there occupied and enjoyed by him as

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parcel of, or appurtenant to, the dwelling-house; and demolished and destroyed the roots, plants, and trees, of the plaintiff, in the said garden, of the value of £30.—The case has been twice argued very ably, and great difficulties have been suggested upon any construction which the court can adopt. It has been urged, That much inconvenience would arise from extending the provisions of the statute, which in express terms mentions only the dwelling-house, to damages arising from the destruction of things not open and visible, and whose value cannot easily be ascertained. That the act is penal in the greatest part of its provisions, and must be so considered with regard to those who are made liable to the action; persons innocent of every thing except a supposed neglect of those exertions which, in many cases, would be utterly ineffectual. That the legislature, on this account, has guarded against the construction contended for on the part of the plaintiff, by tying up the damages by words of express reference, "*such demolishing or pulling down*," which necessarily lead to the consideration of what is described in the prior part of the section. That the case there described must be, *that* demolishing or pulling down which would subject the authors of it to the felony created by this statute, and such felony can only be committed in the demolishing or pulling down the fabric of the house, for if *that* be left entire, the destruction of the furniture, however mischievous to the owner, and whatever intention it may manifest, does not amount to felony. These arguments have great force, and have raised very considerable doubts; but, upon a full consideration of the case, the court has thought itself obliged to decide, that the plaintiff is entitled to recover, as well for the destruction of the furniture, and the damage to the garden, as for the demolition of the house itself. The grounds upon which the determination turns are these. This statute, though penal in a great part of its provisions, and though, perhaps, there is something of a penal nature in transferring the action from the party committing the felony to the hundred, yet, with respect to the party injured, must be considered as remedial. Antecedent to this statute, and till the trespass was turned into a felony, there is no doubt, that, against the actors and their abettors, the party injured would have been entitled to recover damages for all his loss. In lieu of that remedy, which can no longer be had, it was thought better to substitute an action against the hundred, in analogy to the antient policy of the kingdom, by which the men of each district were bound to maintain peace and order, and to answer for the violation of them within that district. The act does not say, that damages shall be yielded for the injury *done to the fabric* of the house, but, *by the demolishing* or pulling down the house; and it seemed to be admitted in the argument, that, if the destruction of the furniture in the house were the *necessary* consequence of the demolition of the house itself, the plaintiff would be entitled to recover the full amount of his loss. If the parties engaged in the destruction of a house, had, by undermining it, thrown in the walls and roof, so that the furniture was crushed to pieces, all that damage, being the *necessary* effect of the demolition of the house, must have been made good to the party injured, as within the very words of the statute; *viz.* "injured "or damnified by such demolishing "or pulling down." The act of felony, in *that* case, *necessarily* produces the damages sustained. But will not the principle extend, likewise, to those damages, which, though not the necessary consequence of the felony committed, yet are clearly the immediate effect of that cause? If, in order to destroy the walls, the mob break down the wainscotting and the glasses,

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Taylor argued for the defendants.—Among other things, he said, the negative part of the finding distinguished this case from both the others. The new felony created by the statute, in the fourth section, is clearly confined to the destruction,

or, if, by driving a beam or joist against the wall to throw *that* down, they break a glass fixed against the wainscot, it would be strange to argue, that such destruction, not being a *necessary*, but only an *immediate* consequence of demolishing the house, should not be repaired by this action. The case might be different as to consequences that are neither necessary nor immediate: If, for instance, one set of rioters had broken in on the 7th of *June*, and destroyed the house, leaving the goods in it, and, the next day, another party had come to the house so left, and robbed it of the furniture. It is here found by the jury, according to the truth of the transaction, that the destruction of the house, of the furniture, and of the garden, was done by the same rioters at one and the same time; that the rioters, "*in demolishing* the house, did damage to the garden, &c." It seems, therefore, to be by no means any stretch of the act, to give it this construction, and the condition of the plaintiff would not be so good, otherwise, with respect to furniture, &c. as it was before. As to the argument urged, with great ingenuity,—"Of the inconvenience which must attend this construction, because of the uncertainty, in the first place, as to what furniture was in the house, and, in the next place, the still greater uncertainty, what the value of that furniture was; whereas the building is visible, all know what it has been, there must necessarily be persons qualified and competent to give a tolerable estimate of it, and the public cannot be liable to much imposition on that account."—That argument has, undoubtedly, a very specious appearance; but it amounts to no more than this, that a case may happen, where the wise and benevolent purposes of the law may be perverted to a fraudulent intent. The present instance, which has brought a great number of these cases before the court, has proved it to be possible to guard against the hundred's being charged beyond the real damage; though there might, at first, be some ground to suspect that the imagination of the party and his friends would exaggerate the amount of it. In most of the actions that have been tried, the loss in respect to furniture has been calculated with tolerable precision; and, if care is taken on the part of those who are to answer for it (and, from the multitude of cases which unfortunately happened last summer, it appears that care may be taken,) there is no great reason to believe, that a jury will be deceived by an over-rated estimate of the injury which the party has sustained in that species of property. If fraud may be practised, it is a fraud of a nature open to detection; and, by a reasonable diligence on the part of those affected by the consequences, the effects of the fraud may be prevented. This is not like the case of an action against the hundred upon a robbery, where the value rests solely in the estimate of the party, and you are obliged to depend on his honesty. The argument, therefore, has not such weight, as at first it seemed to carry with it. But, if it had much more than it has, it would not be sufficient to controul the operation of the act, in a case which falls within its principle. Therefore, upon the whole, we are of opinion, that the plaintiff ought to have all the damages the jury thought fit to give: That he is entitled to recover for the destruction of the furniture, and of the garden, as such destruction is found to be the immediate consequence and effect of the destruction of the house, and done at the same time.

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struction, in whole, or in part, of the buildings themselves, and the sixth section refers to the fourth, and ought not to be carried beyond it. The intention of the legislature was to substitute the relief against the hundred, for the remedy by action of trespass against the individual offenders; the *civil* remedy against them being merged in the felony. Upon this principle, the construction must be, that the hundred is only to answer for such damages as arose from the felonious part of the offence. The statute is to be considered as penal, not only against the rioters, but against the inhabitants of the hundred; for it subjects them to the damages, as a *punishment* for not preventing the mischief. Indeed, to construe a law as remedial in one part, and as penal in another, seems inconsistent; and, since this law is, in many respects, so highly penal, it ought to receive the strictest interpretation. It may be said, that, unless the hundred were to be held liable for the furniture, the sufferer would be in a worse situation than before, because, now, as the offender is made a felon for demolishing the building, the remedy against him for destroying the furniture is also gone. But there are other instances of a like sort, where the remedy against the hundred is not co-extensive with the loss of remedy against the offender. For instance, in cases of robbery, the hundred is not liable if the robber is taken within forty days after the crime was committed *(a)*, nor, in cases under the black act *(b)*, if the offender is convicted within six months. If the contents of a house, furniture, &c. had been meant, they would have been specially mentioned in the act.

Lord MANSFIELD was present, but declined giving any opinion.

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WILLES, *Justice*,—According to this verdict, we must consider the demolishing of the goods and the pulling down of the house as one transaction, committed at one and the same time. The jury go still farther, and say, that the goods were in the house. Then comes the negative part of the finding; but that does not state the destruction of the furniture to have been a separate act. It was already found to have been the same. It would be overturning the good sense of the statute to restrain it in the manner contended for by the counsel for the defendants. The sixth clause I rather consider as remedial. It may be said to be penal as to the hundred, but it is certainly remedial as to the sufferer. The words are, that the inhabitants of the hundred in which such damage shall be done, shall be liable *to yield damages* to the person or persons injured *by such demolishing* or pulling down. What damages? The value of the house is not the whole of the damage. The furniture may be worth twice as much as the building. The decision of the court of *Common*

(a) 13 *Ed.* 1. *st.* 2 c. 1. 28 *Ed.* 3. c. 11. 27 *El.* c. 13. 8 *Geo.* 2. c. 16.

(b) 9 *Geo.* 1. c. 22.

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mon Pleas goes full as far as this case, (though there were in that case no negative words in the finding,) for it extended the remedy to damages out of the house. But in *Radcliffe* v. *Eden*, there was what was tantamount to this negative finding, for it was not stated, that the house was demolished or pulled down wholly or in part, and, if any thing is to be *implied*, it is rather, that the house itself was not demolished in that case, at least the windows, shutters, and doors, were only specified in the case, and it was not even stated, that the household goods were destroyed *by means*, or *in consequence*, of the demolition of any part of the house. It rather seems, that the rioters merely broke open the doors and windows for the purpose of getting into the house. In point of policy, the construction contended for on the part of the plaintiff is certainly to be preferred, if the case were new, which it is not. I think the plaintiff entitled to recover for the furniture as well as the house.

ASHHURST, *Justice*,—I am of the same opinion. If the demolishing of the furniture had been a separate act, I agree with the counsel for the defendants, that it would not have been felony, and that the sufferer could not have recovered against the hundred. But, here, being done at the same time, and in pursuance of the riotous transaction, it is to be considered as part of one and the same act. It was not a necessary, but it was an immediate, consequence of the demolition of the house. The rioters got possession of the furniture by demolishing the house. The act was so much the same, that if one of them had not been in the house, but had received some of the furniture in the street from the others, I think he would have been guilty of felony, as being concerned in the riot. The two cases relied on are not in my opinion to be distinguished from this. The purpose of the act is remedial, and therefore it ought to receive a liberal construction.

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BULLER, *Justice*,—The statute is so penned, that the words might possibly admit of two constructions, and, therefore, it is material to consider, whether it is penal or remedial; because there is a well-known difference in the rule of construction, as applied to laws of the one sort, and of the other. Where they are remedial, the interpretation is to be liberal, so as best to apply to the end. But a law may certainly be penal in one part, and remedial in another [4]; and that is the case here. There is no danger of the liberal construction of the remedial part being extended afterwards to the penal. The distinction has been too long established for any apprehension of that sort. If the clause upon which this case arises is remedial, which I think it is, the most extensive sense must prevail; and it was so held in both the cases

[4] *Bones* v. *Booth*, *C. B. M.* 19 *Geo.* 3. 2 *Blackst.* 1226, 1227.

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cases cited at the bar. *Radcliffe* v. *Eden* was, I believe, the first case on the construction of the statute, and it was fully considered. Mr. *Justice* ASTON said, the sense of the act was, that the damages to which the party offending would have been liable, at common law, should be transferred to the hundred. Mr. *Justice* ASHHURST stated, as a ground of his opinion, that the whole was one act, and, my Lord, after having given a full opinion at first, added, afterwards, "I do not consider the demolition of the household goods "as consequential, but as part of the act." A mistaken idea, that the case was not deliberately decided, was thrown out in the *Common Pleas*, and produced two arguments in the case of *Wilmot* v. *Horton*. It is not possible to distinguish either of the two from this, on any fair principle. In the last, Lord LOUGHBOROUGH, in delivering the opinion of the court, stated the destruction of the goods, &c. as the *immediate*, not the *necessary*, consequence; so that they did not decide, as has been supposed here in the argument for the defendants, on the ground of the one sort of damage having been the *necessary* consequence of the other. The destruction of the furniture was not, in either of the cases, the ne- [707] cessary consequence of the demolition of the house; because it was *part* of the same act. There are, therefore, two prior decisions in point; and, if the question were more doubtful, it must be governed by those decisions. But, independent of authorities, as the clause is remedial, it must receive a liberal construction. As to the supposed difficulty there may be in ascertaining the *quantum* of damages from the destruction of furniture (*a*), such amount is more capable of proof than the value of the house, where the state of the timbers, &c. is often invisible, whereas the quantity and quality of the furniture must be known, in most instances, to many witnesses; and nothing more will be to be done, in these cases, to estimate the loss, than what is necessary in every action of *trover* for household goods.

Judgment for the plaintiff [† 149] [F].

(*a*) This was a topic urged at the bar in the argument here, and much relied on in the case of *Wilmot* v. *Horton*.

[† 149] *Vide Mason* v. *Sainsbury*, *B. R. E. 22 Geo. 3. and the London Assurance Company* v. *Sainsbury*, *B. R. T* *23 Geo. 3. & Cam. Scacc. H. 25 Geo. 3.*

[F] In *Greasley* v. *Higginbottom*, 1 *East.* 636, where the mob had pulled down and damaged part of the plaintiff's house, by means of which some flour of the plaintiff was spoiled and destroyed; and they then proceeded to take possession of the remainder of the flour, part of which was stolen, and part sold out among themselves at an under price; it was held, that he could only recover for the damage done to the house, and that part of the flour which was spoiled and destroyed by means thereof. This case does not appear to have been there cited.

STONE *against* FORSYTH.

Friday, 22d June.

The will of a *feme covert*, authorized by a power in her marriage-settlement, cannot be given in evidence, to shew a title to *personal* property, till it has been proved in the ecclesiastical court.

ISSUE being joined on a plea in bar to an avowry for rent in arrear, the cause was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Hilary Term*, and a case reserved, which stated;

That *Ann Wilson*, widow, being possessed of a leasehold estate, for a long term of years, and money and goods, and having two children, prepared *her will*, (which was set forth in the case, *in hæc verba*,) by which she gave the leasehold estate, and her money and goods, to her executors therein named, in trust for her children. The will concluded thus.— "In witness whereof, I have hereunto set my hand and seal, "*the 27th day of March*, 1779, *Ann Wilson*. Duly attested "by *John Crouth* and *John Davies*."—That in contemplation of a marriage with the defendant, the said *Ann Wilson* had entered into articles to the following effect:—"Articles "of agreement *made the 17th of April*, 1779, between, &c."— That the articles recited an intended marriage between her and the defendant, and that it was agreed, that she should have all her leasehold estate, money, &c. for her separate use. That, for that end, the defendant covenanted and agreed with one of the persons made an executor by the will, as a [tr]ustee for the wife, that, notwithstanding the intended marriage should take effect, and, from and after the solemni[z]ation thereof, the leasehold estate should be held and possessed by such person, and to such uses, as she should, at any time during her life, limit, give, demise, order, appoint, or dispose of, either by her last will and testament, in writing, or by any other writing, purporting or intending to be her last will and testament, or by any other writing, to be signed with her hand, or to which she should subscribe her mark, in the presence of two or more credible witnesses; that the defendant would permit and suffer her to make such will, or other writing, as aforesaid, and *that he would permit and suffer such will thereafter to be made, to be fully proved by the executors in such will named, and probate of such will to be had and taken as usual*; and that the person or persons to whom the said *Ann* should give and dispose of her separate estate, by her will or any other writing that should be signed, sealed, and executed, by her, in the presence of two or more credible witnesses, as aforesaid, should, and might, peaceably enjoy the same. That the said will and marriage articles were both executed *on the same day*, at the same place, and before the same witnesses. That the marriage was so-

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lemnized on the 27th of *April*, 1779, and *Ann Wilson* died on the 31*st of December*, 1779. That the said will *had not been proved*, but letters of administration of the estate and effects of the testatrix had been granted to the defendant. That the will had been offered to be proved, but probate was refused, only because, upon the face of the articles, the will bore date before the articles.

The question stated for the opinion of the court was, whether the will was a valid disposition of the effects of the wife. If it was, a verdict to be entered for the plaintiff, and *vice versâ*.

This case was to have been argued this day, by *Bower*, for the plaintiff, and *Morgan*, for the defendant.

Bower stated the question to be a mere question of presumption, as to the priority in point of time in the execution of the two instruments, the will, and the articles; for, [709] if the will was posterior to the articles, though executed the same day, it was then valid [☞], and the defendant had no title; but Lord MANSFIELD said, another question would first arise, *viz.* whether the court could take any notice of the paper called a *will*, till proved in the Ecclesiastical court. *Bower*, upon this, contended, that, though called a will, yet this, in truth, was not one, in a strict legal sense, but an appointment, and, therefore, did not require a compliance with the rules respecting wills properly so called. But his Lordship said, it had been settled, that, before you can come into Chancery, on a title to personal property, under the will of a *feme covert* [1], to whom the power of making a will is reserved, such will must be proved at the Commons; and that the same rule must prevail in a court of law: that, if the Ecclesiastical court would not grant probate, the proper course was to appeal to the Delegates [† 150].

The *Postea* to be delivered to the defendant [2].

[☞] S. P. *Taylor* v. *Rains*, *B. R. H.* 1 *Ann.* 7 *Mod.* 147. In 11 *Vin.* Title *Executor D.* pl. 1, in marg. this is supposed to be the same case with *Shardelow* v. *Naylor*, 1 *Salk.* 313, though the two reports differ in this material fact, that in 7 *Mod.* the will is stated to have been executed before, in *Salk.* after, the marriage.

[1] Though this will was executed *before* the marriage, yet, as the marriage, if there had been no power reserved by the articles, would have revoked it *(a)*, and it could only be valid on the supposition of its being executed subsequent to, and authorized by them, it must be considered exactly in the same light as if made after the marriage.

[† 150] *Vide Ross* v. *Ewer*, *Canc.* 1744. 3 *Atk.* 156. 160. 162. *Jenkins* v. *Whitehouse*, *B. R. M.* 31 *Geo.* 1 *Bur.* 431, ☞ According to which cases and also *Taylor* v. *Rains*, cited *supra*, p. 708, note [☞], the regular course, in cases like this, is, for the Spiritual court not to give *probate* of the will, but *administration*, with the will, as a testamentary paper, annexed.

[2] There were *several* avowries on the record, and issues joined on all; and, the jury having found for the plaintiff

(a) Vide Brady v. *Cubitt*, *M.* 19 *Geo.* 3. *supra*, p. 34 to 40.

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plaintiff on all but that on which the case was reserved, afterwards, in *Trinity Term*, 22 *Geo.* 3. *Morgan* obtained a rule to shew cause why the Master should not allow the defendant the full costs on all the issues. He contended, that a defendant or avowant in replevin, is an actor, and to many purposes considered in law as a plaintiff. That different avowries, therefore, ought to be looked upon as different counts in a declaration, and that when separate issues are joined on different counts, and any one of them is found for the plaintiff, he is allowed the costs of the whole record. *Vide supra*, *Butcher* v. *Green*, *E.* 21 *Geo.* 3. p. 652. That, by § 5. of 4 *Ann. c.* 16. if any special matter pleaded by virtue of that statute by any *defendant*, *tenant*, or *plaintiff in replevin*, shall be judged insufficient on demurrer, or found for the plaintiff or demandant on verdict, costs are given; but that it could not be supposed, that, in the general words "*defendants* or *tenants*," were included *avowants* or *defendants in replevin*; and if they were not included, they ought, upon general principles, to have their full costs, in such a case, because, if any one of the avowries is found against the plaintiff, it shews that he had no cause of action. On *Wednesday* the 5th of *June*, 1782. *Wallace* and *Bower* shewed cause; and Lord MANSFIELD, WILLES, and BULLER, *Justices*, (ASHHURST, *Justice*, being absent,) were clear, that an avowant is a defendant within the meaning of the act, and said, it had always been so considered in the taxation of costs.

Indeed if it were not so, there would be no authority under § 4. to plead different avowries.

Vide Cotn v. *Bowles*, *B. R. H.* 2 & 3 *Will. & Mary* where it was held, that an avowant is not a plaintiff within the meaning of 3 *Hen.* 7. *c.* 10. so as to be entitled to costs on the affirmance of a judgment in his favour upon a writ of error. *Carth.* 122. 4 *Mod.* 7. 1 *Show.* 13. 165. 1 *Salk.* 95. 205.

DOE, Lessee of Sir WILLIAM GIBBONS, Bart. *against* POTT and Others.

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Tuesday, 26th June.

If a lord of a manor mortgage the manor in fee to *A.* and afterwards purchase copyholds held of the manor, and take surrenders of them to himself in fee, they shall enure to the benefit of the mortgagee; and a settlement by the lord of all his estate mortgaged to *A.* shall pass the equity of redemption of such surrendered copyholds.—If a mortgagor devises the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate to a trustee in trust for the mortgagor, such a transfer of the legal estate shall not operate as a revocation of the will.

UPON an ejectment, tried before Lord MANSFIELD, at the Sittings for MIDDLESEX, a case was reserved for the opinion of the court, the material part whereof was as follows:—

By lease and release, dated the 29th and 30th of *March*, 1754, the manor or lordship of *Stanwell*, with the rents of assize, rents of the freehold and customary tenants, and all rights, privileges, and appurtenances, to the said manor belonging, and divers freehold lands, and also the manor of *Shepcotts*, alias *Hammonds*, with the rights, members, and appurtenances thereof, and divers freehold messuages and lands, were, for a valuable consideration, conveyed by the trustees

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trustees of the Earl of *Dunmore* deceased, to Sir *John Gibbons*, and his heirs. By indenture, dated the 2d of *April* following, Sir *John Gibbons* mortgaged *all the aforesaid premises* to the said trustees, for the term of 1000 years, for securing £10,000 and interest, being the sum he was deficient of paying for his original purchase. By lease and release, dated the 7th and 8th of *April*, 1755, Sir *John Gibbons* mortgaged in fee, to *Agatha Child*, *the manors and premises so purchased by him as aforesaid* of and from the trustees of the Earl of *Dunmore*, and therein particularly mentioned, for securing £20,000 and interest, out of which sum the £10,000 and interest, due to the Earl of *Dunmore's* trustees, was paid off, and the term of 1000 years assigned, by an indenture, dated the said 8th of *April*, 1755, to a trustee for the better securing the £20,000, which was not paid at the time stipulated in the mortgage. Between the time of this last mortgage to Mrs. *Child*, and the year 1767, Sir *John Gibbons* purchased several copyhold tenements and lands, (being part of the premises in question,) held of the manor of *Stanwell*, and the customary tenants, of whom he purchased them, surrendered them into the hands of the lord of the said manor, by the rod, (some into the hands of Sir *John* himself, and some by the hands and acceptance of the steward of the said manor;) unto the said Sir *John Gibbons* (who was described in the surrenders as lord of the said manor of *Stanwell*,) his heirs and assigns for ever. By lease [711] and release, dated on the 17th and 18th of *April*, 1755, certain *freehold* messuages, lands, tenements, and hereditaments, situated in *Stanwell*, were sold and conveyed to Sir *John Gibbons*, and all and singular the said last-mentioned messuages, lands, tenements, and premises, were, by lease and release, dated the 19th and 20th of *April*, 1755, mortgaged in fee to Mrs. *Child*, for the further securing the £20,000. By lease and release, dated on the 30th and 31st of *August*, 1771, in consideration of a marriage then intended between the lessor of the plaintiff, (the eldest son of Sir *John Gibbons*,) and his now wife, and of her marriage portion,—(after reciting that Sir *John Gibbons* was seised of all that the manor, or reputed manor or lordship of *Stanwell*, and of the manor of *Shepcotts*, alias *Hammonds*, and of the capital messuages, and of divers other messuages, mills, lands, tenements, and hereditaments, which he purchased from the trustees of the Earl of *Dunmore*, subject to a mortgage thereof made by him to *Agatha Child*,)—Sir *John Gibbons* conveyed to *William Buller* and *Joseph Pickering*, in fee, all that the manor or lordship of *Stanwell*, with the rights, members, jurisdictions, privileges, rents of assize, rents of the freehold and customary tenants, and all other the appurtenances thereunto belonging, and also all that the manor of *Shepcotts*, alias

alias *Hammonds*, with the rights, members, and appurtenances thereof, and all and singular the messuages, lands, tenements, hereditaments, and premises therein particularly described, *and are the same premises which he purchased of the said trustees of the Earl of Dunmore*, and which were conveyed to him by the indentures of the 29th and 30th of *March*, 1754, and *also comprised* in the mortgage to the said *Agatha Child*, of the 7th and 8th of *April*, 1755, to secure an annuity of £1000 out of the same to the lessor of the plaintiff, during his and his father's joint lives, and to the intended wife of the lessor of the plaintiff, after the death of her said intended husband, as her jointure, and, subject thereto, to the use of Sir *John Gibbons* for life, remainder to trustees to support, &c. *remainder to the use of the lessor of the plaintiff for life*, with several remainders over, *and the ultimate remainder to Sir John Gibbons in fee.* On the 22d of *November*, 1772, Sir *John Gibbons* made his will, whereby, after reciting the last-mentioned lease and release of the 30th and 31st of *August*, 1771, he devised the reversion in fee of the said manors of *Stanwell* and *Shepcotts*, alias *Hammonds*, *and all the lands, hereditaments, and premises which he purchased of the trustees of Lord Dunmore, deceased*, to Dr. *Erasmus Saunders*, (since deceased,) and *Joseph Pickering*, in fee, upon certain trusts and to certain uses not material to be stated. The will then recited, that he had made several very considerable purchases of *several other real estates* at *Stanwell* aforesaid, and elsewhere in the same county, since the purchase of his said manor of *Stanwell*, and other premises therein before mentioned, made of the trustees of the Earl of *Dunmore*, and he, thereby, gave to the said Dr. *Erasmus Saunders*, and *Joseph Pickering*, and their heirs, all other his messuages, lands, hereditaments, and *real estates* at *Stanwell*, or elsewhere in the said county (of *Middlesex*,) with their appurtenances, (except such parts thereof as were inclosed within his gardens and park.) in trust to sell and dispose thereof, and, with the money arising from the sale, to pay and discharge all principal and interest due on any mortgages, *or other incumbrances affecting the said estate*, and, from and after payment thereof, to apply the residue of such purchase-monies in paying and discharging the fortunes therein before given to his younger children. At the time when Sir *John Gibbons* made his will, the manors of *Stanwell* and *Shepcotts*, alias *Hammonds*, were in mortgage to Mrs. *Child*, as before stated, and all the copyhold premises before mentioned were purchased by him after the mortgage made to Mrs. *Child*. By lease and release, dated the 1st and 2d of *March*, 1776, in consideration of the sum of £20,000 (Mrs. *Child's* mortgage-money,) paid to the persons then entitled to the same, by *Buller* and *Pickering*, the trustees

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tees in the marriage-settlement of the lessor of the plaintiff, all the said manors, and all the other messuages, lands, tenements, and hereditaments, contained in the said mortgage of the 7th and 8th of *April*, 1755, and purchased by Sir *John Gibbons* of the said trustees of the Earl of *Dunmore*, were, at the request of Sir *John Gibbons*, and of the lessor of the plaintiff and his wife, released and confirmed to the said *Buller* and *Pickering*, and their heirs, to the same uses and trusts as by the marriage-settlement of the 30th and 31st of *August*, 1771, were limited concerning the same, freed and discharged from all equity, terms, provisoes, and conditions, of redemption. By lease and release, dated on the same days respectively, and made between the same parties with those last mentioned,—after reciting that the £20,000 and all interest had been paid, and that, thereby, the premises conveyed for better securing the payment thereof were become released and discharged,—all and singular the capital [713] messuage, and all other messuages, lands, tenements, hereditaments, and premises, in the lease and release of the 19th and 20th of *April*, 1755, mentioned, were duly granted, released, and conveyed to the use of the said *Joseph Pickering*, his heirs and assigns, free from the proviso of redemption contained in the release of the 20th of *April*, 1755, in trust for Sir *John Gibbons* in fee. Sir *John Gibbons* died in *June*, 1776, without revoking or altering his will, greatly indebted to many persons by bonds; leaving the lessor of the plaintiff his heir at law: And the surviving trustee under the will, conceiving himself entitled to the premises contained in the different surrenders herein before mentioned, and also to the freehold premises contained in the lease and release of the 17th and 18th of *April*, 1755, had agreed to sell the same to pay Sir *John's* debts, but the lessor of the plaintiff also conceiving himself entitled to the same premises, he hath brought this ejectment for the recovery of the possession thereof.

Upon this case, the questions stated for the opinion of the court, were;

1. Whether the lessor of the plaintiff, as heir at law of his father, or as tenant for life in possession of the estates comprised in his marriage-settlement, is entitled to the premises contained in the said surrenders?

2. Whether the lessor of the plaintiff, as heir at law of his father, is entitled to the premises contained in the lease and release of the 17th and 18th of *April*, 1755?

On *Tuesday*, the 19th of *June*, the case was argued, by *Lawrence*, for the plaintiff, and *Wilson*, for the defendant.

The arguments for the plaintiff were to the following effect.

1st *Question*.—On this part of the case, it was contended;

1. That

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1. That the copyhold lands passed to Sir *William Gibbons* for life by the terms of the marriage-settlement; or, 2. That they were not comprised in the will of Sir *John Gibbons*, and, therefore, descended to Sir *William*, as his heir at law. 1. The copyhold lands were parcel of the manor of *Stanwell*, for they are stated to have been held of the manor, and, in contemplation of law, customary lands held of a manor are parcel thereof. The freehold interest is in the lord, for which reason the copyholder cannot prescribe in a *que estate*. The forms of *conveyancing*, as well as those of *pleading*, prove the same position; for copyholds pass by surrender to the lord, and, from the nature of a surrender, it can only be made to one who has a higher interest in the estate than the person who surrenders. The copyholder is, in point of law, only tenant at will. These copyhold lands, therefore, passed by the original and subsequent deeds. The words are certainly sufficiently comprehensive to include them; for they not only mention "manor or lordship," but also "all rights, privileges, and appurtenances thereunto "belonging." Sir *John Gibbons*, as mortgagor in possession, could do no acts to injure or diminish the security of the mortgagee; though he might do such as should tend to her advantage. He might take a surrender, or an escheat, for the benefit of the mortgagee. So it is settled, "that if one who "has a manor devise it, and, after, a tenancy escheat, that "shall pass by the devise as part of the manor;" *Bunter* v. *Coke* (*a*). The surrenders to Sir *John Gibbons* were the mere determinations of estates at will in parcel of the manor mortgaged to Mrs. *Child*. The lands surrendered became, after the surrender, part of the mortgaged premises comprised in the deeds of the 7th and 8th of *April*, 1755, and in the marriage-settlement of Sir *William Gibbons*; and, therefore, after the redemption of the mortgage, and the death of Sir *John*, they vested in Sir *William* as tenant for life.—2. But, if the court should think the settled estate confined to such lands as Sir *John* had at the time of the first mortgage to Mrs. *Child*, Sir *William* will be entitled to them as heir at law, if they did not pass by the will. Now, by the will, nothing is devised but a *reversion* in the manors, and the freehold estate, (exclusive of the manors,) which he purchased afterwards.

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2d Question.—There are also two grounds upon which Sir *William's* claim to the freehold purchases of his father may be supported.—1. The purpose of the second devise was to pay off mortgages and *other incumbrances* affecting the lands, and which were a real lien, and would be a charge upon them, into whatever hands they might come. Now, after the mortgage on the freehold purchase was paid off, there were no incumbrances

(*a*) B. R. M. 6 *Ann.* 1 *Salk.* 237, 238.

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incumbrances on the freehold estate, that would have followed it into whatever hands it came. The testator is not *stated* to have left any bonds which would affect the land. Before the statute of 3 *W.* & *M.* c. 14. lands in the hands of a devisee were not liable to bond-debts, and, since the statute, it has been held "that a bond is not a lien upon the land;" *Parslowe* v. *Weedon* (*b*). If an heir at law sell the lands, a bond-creditor cannot follow them. The purpose of the devise to

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the trustees being, therefore, fulfilled before the testator's death, the devise itself became void.—But, 2. If this construction should not be adopted, still, an event happened after the making the will, by which that part of it which relates to the freehold purchase was revoked. It is an established rule, that, if the nature of a testator's interest is altered after the devise, such alteration operates as a revocation in law *pro tanto*. Thus, if a man, seised in fee, make a will of lands, and, afterwards, make a feoffment, or levy a fine, to the use of himself in fee, though he is in of the old estate, yet this is a revocation. 1 *Rolle's Abr.* 614, 615. Now, in this case, at the time of the will, the legal estate was in Mrs. *Child*, and, after the will, was transferred from her, and conveyed to *Pickering*, and, though the equitable interest may have remained the same after the conveyance to *Pickering*, yet, there having been an alteration in the legal estate after the will, that shall operate as a revocation; for it was determined, in the case of *the Earl of Lincoln* v. *Rolls* (*a*), that equitable and legal estates, as to implied revocations, stand upon the same footing, and are governed by the same rules.

For the defendant, the substance of the arguments was as follows:

1*st Question.*—1. All the interest which Sir *John Gibbons* had in the manor of *Stanwell* at the time of the first mortgage certainly passed by the marriage-settlement, to the lessor of the plaintiff; therefore, the freehold interest in the whole passed; but the copyhold interest did not pass, because that was not in Sir *John* at the time of the mortgage. The copyhold interest is a distinct permanent thing, taken notice of by the law, and was, in this case, in divers persons distinct from the lord, at the time of the mortgage. As soon as the mortgage became forfeited, Mrs. *Child* had an absolute estate in fee-simple in the manor, or freehold part; and Sir *John*, from that time, was only her tenant at will. Under those circumstances, the surrenders were made to him in fee. It is not true, when a tenant of a manor, either for a lesser estate, or in fee, takes, by surrender or forfeiture, a copyhold estate held of the manor, that the copyhold is thereby extinguished, and blended in the manor. In the first case, the qualified holder of the manor cannot extinguish it; for, if he lets it for

(*b*) *Canc. Trin.* 1718. 1 *Eq. Ca.* 149. *Parl. Cases* 154. *S. C.* 1 *Eq. Ca.*

(*a*) *Dom. Proc. T.* 1 695. *Show.* 411, 412. 2 *Frem.* 202.

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for years by indenture, it will still continue demiseable, as copyhold, by the reversioner. In the other case, *i. e.* where he is tenant in fee of the manor, he *may* extinguish the copyhold by granting it out by a deed or common-law conveyance, for, after that, it would lose an essential quality of copyhold, because it would not have continued demiseable by copy of court roll; but, in *that* case, till he does, the copyhold interest only continues suspended, and it may be granted out again as copyhold. If Sir *John Gibbons* had had no interest in the manor at the times of the surrenders to him; if, for instance, Mrs. *Child* had, before that time, taken possession of it by ejectment, he might have compelled her to admit him as tenant of the surrendered copyholds. Being tenant at will under her, at the time the copyhold interest was suspended, he could not admit himself; but, as soon as his tenancy at will should have ceased, by a severance of the possession of the manor, and of the copyhold, he could have obliged her to admit him; and she would have been entitled to all the incidental services from him. This doctrine is clearly explained in *Frenche's* Case *(a)*, and in that of *Conesbie* v. *Rusky (b)*.—2. If these copyhold lands are not comprehended in the settlement, they must be considered as having passed by the will. There are certainly words sufficient for that purpose, *viz.* "All other my messuages, lands, "hereditaments, and real estates." That general words like these will pass copyhold, as well as freehold, lands, has often been determined [1]; as in *Acherley* v. *Vernon (c)*, and *Doe, Lessee of Pate,* v. *Davy (d)* [2] [† 151].

It

(a) B. R. M. 18 & 19 *El.* 4 *Co.* 31. *a, b.*

(b) B. R. E. 38 *El. Cro. El.* 459.

[1] The words of the statute of 27 *Eliz.* c. 4. § 2. against covinous and fraudulent conveyances, are, "*lands, tenements, or other heredita-* "*ments whatsoever.*" In the *Law of N. Pr.* p. 108, edition of 1775, a case is stated, where *Blencowe*, Justice, said, that copyholds are not within those words; but, in *Doe, Lessee of Watson & others*, v. *Routledge*, B. R. M. 18 *Geo.* 3. [† 152] Lord *Mansfield* said, that *dictum* was of no authority, and ought to be rejected; and *Aston*, Justice, said, he remembered a case, where general words of that sort had been held to comprehend copyholds. The court, however, in that case, desired it might be understood, that they gave no decisive opinion on the point.

By 13 *Eliz.* c. 7. § 2. commissioners of bankrupt are authorized to dispose of "*all the bankrupt's lands, tenements,* "*or hereditaments, as well copy or* "*customary hold*, as freehold," by which it should seem, that the legislature, at that time, thought the general words as applicable to copyhold as to freehold.

(c) Canc. M. 10 *Geo.* 1. 9 *Mod.* 68. 10 *Mod.* 518. *Com.* 381.

(d) B. R. M. 15 *Geo.* 3.

[2] That case was as follows: *William Davy*, by his will, dated *April*, 1767,

[† 151] Since reported, *Cowp.* 158. [† 152] Since reported, *Cowp.* 705.

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It is true, these copyholds were not surrendered by Sir *John Gibbons* to the use of his will, but he was in a situation, with regard to them, at the time of making his will, which rendered that impossible; for he was tenant of the manor itself, under Mrs. *Child*, and could not surrender to himself. But it will not be *denied*, that the copyholds were *descendible*, and, if so, they were *deviseable*; those terms being *convertible*, according to the doctrine in *Selwin* v. *Selwin* (a), as stated by Lord MANSFIELD, in delivering the opinion of the court in *Roe* v. *Griffiths* (b).

2d Question.—1. The argument drawn from the word "*incumbrances*," in the devise of the freehold lands, loses any effect it might otherwise be imagined to have, when it is considered, that the object of the devise to the trustee was not solely to pay the debts; for the residue of the money arising from the sale is directed to be applied to the payment of the younger children's fortunes, and that trust is not pretended to be yet satisfied. This supersedes the necessity of showing what however seems pretty clear, *viz.* that "*other incumbrances*"

1767, and attested by three witnesses, after several general and specific devises, and legacies, made the following residuary devise: "And, as to all the rest and residue of my estate, of what nature, kind, or quality soever, I give and bequeath the same unto my brother *William Pate*, his heirs, executors and administrators, according to the nature of the respective estates." On the 16th of *May*, 1768, the testator purchased, and was admitted to, a copyhold estate, in fee, at *Hampstead*, and, at the same court, surrendered it to such use as he should, by his last will in writing, limit and appoint. On the 18th of *November*, 1769, he made a codicil, attested by three witnesses, reciting, that he had made his will in 1767, by which he had devised certain fee-farm rents, and now, by this codicil, he gave those rents to Mrs. *Davy* for the term of her natural life, and gave her the house at *Hampstead* for life, &c. and some other specific legacies, and then followed this clause; "And I do *ratify* and "confirm all and every the gifts, de-"vises, and bequests, contained in my "said will, except what I have here-"by altered; and I do desire, that "the present writing may be annexed "to, accepted, and taken, as a co-"dicil to my said will, to all intents "and purposes." At the time when the will was made, he had no copyhold lands. The question was, if those acquired afterwards passed by the will. The court held, that they did; that the words in the will were sufficient to pass copyhold property, and that the effect of the codicil was to operate as a *republication*, and to bring the will to the date of the codicil [☞], and for this they relied on *Acherly* v. *Vernon*, reported by *Comyns*, as an authority in point.

(a) *B. R. M.* 1 *Geo.* 3. 2 *Burr.* 1131. 1 *Blackst.* 222. 251.

(b) *B. R. M.* 7 *Geo.* 3. 4 *Burr.* 1952. 1962. 1 *Blackst.* 605, 606.

[☞] Copyhold lands purchased after the making of a will, do not pass by such will. *Spring* v. *Biles*, *B. R. M.* 24 *Geo.* 3. 1 *Term*, *Rep.* 435, & *Cam. Scacc.*

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"*cumbrances*" must be construed to include bonds.—2. As to the supposed implied revocation, Sir *John Gibbons*, at the time of the will, had only an equitable estate; the legal interest was in Mrs. *Child*. In like manner, at his death, as well as during the intervening period of time, he had but an equitable estate. The legal title had been shifted from Mrs. [718] *Child* to *Pickering*, but the *equitable* title had remained unaltered in the testator. Now, that a will is not revoked by the mere change of a trustee, was directly and solemnly decided in the court of *Chancery*, on a re-hearing, and after full argument at the bar, in a recent case of *Watts & others* v. *Fullarton* (c); the circumstances of which case were these: *William Watts*, by his will, dated the 11th of *May*, 1762, devised all his real estate in *Berkshire*, to certain trustees, and their heirs, to the use of the first and second sons, and first and second daughters, successively, in strict settlement, with remainder to his own right heirs. On the 29th of *February*, 1764, he made a codicil to this will, reciting, that, since the publication thereof, he had contracted with the Duke of *Kingston* for the purchase of certain lands in *Buckinghamshire*, and, thereby, directed the trustees and executors in his will, out of the *residuum* of his personal estate, to pay the purchase-money, and, on payment thereof, he directed, that the said purchased premises should be conveyed, settled, and limited, to the same uses, and on the same trusts, as by his will he had limited, and declared, concerning his estate in *Berkshire*. Afterwards, the testator *himself* compleated the purchase referred to in the codicil, and took a conveyance of the purchased premises, to certain trustees therein named, in fee, in trust for himself, and his heirs, soon after which he died. The bill was brought by the younger children, to have, (*inter alia*,) the trusts in the will and codicil carried into execution, as to the new purchased estate. The *Master of the Rolls* having omitted to give any directions as to that point, the case came on, by petition and appeal, before the Lord CHANCELLOR, and the question was, Whether the conveyance of the new purchased lands to the trustees, subsequent to the will and codicil, was not, *pro tanto*, a revocation thereof? The testator *Watts*, at the time of making the codicil, the thing being *in fieri*, was in the nature of a mortgagor, and the Duke of *Kingston* a trustee for him. Afterwards, before his death, the legal estate vested in the new trustees. Yet Lord BATHURST decreed, that there was no revocation, and that the trusts should be carried into execution [† 153]; relying much on the general proposition laid down by Lord [719] HARDWICKE, in *Parsons* v. *Freeman* (a), *viz*. "That, where "a man

(c) *Canc. T.* 14 *Geo.* 3.

[† 153] *Vide Greenhill* v. *Greenhill*, 749. *Canc. H.* 1711. 2 *Vern.* 679.

(a) *Canc.* 9 *Nov.* 1751. 3 *Atk.* 741.

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" a man has an equitable interest in fee, in an estate, and " devises it, and afterwards makes a conveyance of the legal " estate to the same uses, this is no revocation."—That case of *Watts* v. *Fullarton* is decisive, being indeed stronge than the present, for even the equitable interest had, there, been in some degree altered.

Lawrence, in reply, insisted; 1. With regard to the copyhold lands, that it was sufficient for his argument, that Sir *John Gibbons* was lord of the manor, in possession at the time of the surrender. That he meant to benefit the manor, not to keep the copyholds distinct. If *that* had been his intention, he would have purchased them in another person's name. He also contended, that, though it was true that the settlement referred to the mortgage, yet, if all the words were taken together, there was enough to pass copyholds purchased after the mortgage, though they should be held not to be subject to the mortgage. But if they should not be thought by the court to pass by the settlement, still they could never be included in the will, since, after disposing of the reversion of the manors, and quitting that subject, it recites that he had made considerable purchases of *other* real estates, and then disposes of " all *other* his messuages, lands, " *&c.*" words clearly calculated to exclude every thing belonging to the manors. 2. As to the freehold lands, he said, the case of *Watts* v. *Fullarton* was contrary to that of *the Earl of Lincoln* v. *Rolls*, and seemed a very extraordinary determination; for that, at the time of the codicil, *Watts*, had no interest in the land afterwards purchased of the Duke of *Kingston*, and nothing but a mere claim.

Lord MANSFIELD said, that, in equity, they considered such a contract as that recited in the codicil in *Watts* v. *Fullarton*, as compleated, so as to make the seller a trustee, and the buyer *cestui que trust*; that, if the parties had died before any conveyance, the heir of *Watts*, (had there been no devise,) would have taken the land, and the executors of the Duke of *Kingston*, the money. His Lordship then asked *Lawrence*, how the heir at law could maintain an ejectment for the freehold lands, as the legal interest was clearly in *Pickering*; to which he answered, that he conceived it to be now settled, that the title of a mere trustee shall never be set up to keep the *cestui que trust* out of possession.

[720]

The court took time to consider till this day, when Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—Except Mr. Justice BULLER,—who, for private reasons of connection with one of the parties, has declined giving any opinion, and has had no share in our deliberations,—we are all clear in the opinion I shall now deliver. This ejectment is brought to recover the possession of two

denominations

denominations of land; 1. Certain copyhold or customary tenements held of the manor of *Stanwell*, which were surrendered to Sir *John Gibbons*, prior to the settlement on the marriage of his son, the present lessor of the plaintiff; and, 2. Certain freehold lands which were purchased and mortgaged in fee, by Sir *John*, then, after the settlement, devised by will, and, after that, the mortgage upon them paid off, and a conveyance of them made by the mortgagee to a trustee. I will take them separately; because the questions concerning them are entirely different, and independent.

1. As to the copyhold tenements, the facts, in substance, are shortly these: —(Here his Lordship stated the material part of the case, as far as concerned the copyholds, and said, he thought, under the word "manor," all the consequences and incidents would have passed, which, in these, as in all the common dragnet conveyances, were specifically enumerated.)—The question, on this part of the case, is, whether these copyhold tenements go to Sir *William* as tenant for life under the settlement, or whether they pass by the will; and we are clearly of opinion that they must go to the uses of the settlement. To go by steps: After the mortgage, the mortgagee in fee had a right to the manor and every thing held of it as parcel thereof [F 1]. In *notion of law*, the mortgagor was only tenant at will, or, at most, from year to year. He had the lowest estate possible. In *equity*, he was lord of the manor, subject to the charge upon it; but he could do nothing to weaken the security. In both views it is clear what he could do in consequence of the surrenders. He had the option, if he had been absolutely tenant in fee, either to continue the copyholds as parcel of the manor,—by granting them out again by copy of court roll, because the custom is not broken by their merely having continued in the lord's hand, but they may, notwithstanding, be alleged to have been demised and demiseable, by copy of court roll, which is all that is necessary,—or to sever them from the manor, by any common-law conveyance, as a lease, &c. But the manor being mortgaged in fee, he could not sever them, because *that* would have diminished the security; for the mortgagee had a right to the services, quit-rents, escheats, forfeitures, and other casualties. If we consider *his* legal interest, being only tenant at will, he could not sever the copyholds. The argument is stronger on the settlement, for the surrenders had then

[F 1] So in *Roe* v. *Wegg*, 6 *T. R.* 708, it was held that where the lord of a manor devised it by will, and afterwards purchased copyhold tenements, parcel thereof, which were surrendered to him, those tenements passed by the will.

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then been made, and all is included in the settlement, so that, after *that*, he could not sever, in respect of the settlement. The next consideration is, had Sir *John* any idea of severing the copyholds? Did he mean to do it by his will? It is plain, on the face of it, that he did not; for, after reciting the settlement, he devises only *the reversion* of the manors, and does not mention the customary lands. Then, he devises "*all* "*other*, his messuages, lands, hereditaments, and real es- "tates." Therefore *quâcunque viâ*, we are clearly of opinion, that Sir *William* is entitled to the copyhold tenements; because, 1. They were settled as part of the manor, and could not be severed by the will; and, 2. If they could have been severed by the will, *that* was not done.

2. With regard to the freehold estate, the facts are as follows:—(His Lordship then gave an abridgment of the case as to what concerned the second question.)—These lands are claimed by the lessor of the plaintiff in this ejectment, as heir at law to his father. The objection to this is, that he cannot recover them in ejectment as heir at law, because, (independent of the devise,) by the lease and release of the 1st and 2d of *March*, 1776, they were conveyed in fee to a trustee, and the legal estate is in such trustee. It is answered, that this is indeed, *primâ facie*, true, but that it has been settled for years, that a mere trust estate shall not be set up against a *cestui que trust* [† 154]; and, the conveyance to *Pickering* having operated as a revocation of the devise of these lands, he is a mere trustee for the heir at law. Now, in the first place, the rule only is, (and I hope it is so understood,) that the trust estate shall not be set up in an ejectment to defeat the *cestui que trust* in a *clear* case. In such a case, where the trust is perfectly clear and manifest, the rule stands [722] upon strong and beneficial principles, because, in ejectment, the question is, who is entitled to the possession. But, if the trust is doubtful, a court of law will not decide upon it in an ejectment. It must be put into another way of enquiry. But, in the second place, there seems to be no doubt here, that the person having the legal estate is not a trustee for the heir

[† 154] *Vide Goodtitle* v. *Knot*, *B. R. E.* 14. *Geo.* 3. *Cowp.* 43. 46. *Lade* v. *Holford*, *B. R. E.* 3 *Geo.* 3. *Law of N. Pr. Ed* 1775. p. 110. *Butterfield* v. *Heath*, *B. R. H.* 23 *Geo.* 3. ☞ *Doe*, lessee of *Bristowe* v. *Pegge*, *B. R. E.* 25 *Geo.* 3. 1 *Term Rep.* 758, *n. (a)*. But, *vide Doe*, lessee of *Hodsden*, v. *Staple*, *B. R. M.* 29 *Geo.* 3. 2 *Term Rep.* 684 [F 2].

[F 2] See also *Doe* d. *Bowerman* v. *Sybourn*, 7 *T. R.* 3, *Roe* d. *Reade* v. *Reade*, 8 *T. R.* 118, and *Doe* v. *Wroot*, 5 *East.* 132, where the doctrine in the text, that the legal estate in a trustee cannot be set up in ejectment against the *cestui que* trust, is mentioned as long ago repudiated.

heir at law. Sir *John Gibbons*, at the time of the devise, had merely the *equitable* fee in him. Mrs. *Child* was his trustee. Then, on payment of the mortgage money, she conveyed the legal estate in fee to *Pickering*, which was merely transferring it from one trustee for Sir *John* to another; and I know of no determination, or case, in which a bare change of a trustee has been held to revoke a will. On the contrary, Mr. *Wilson* cited a very strong case where it was held, that it does not. All revocations, which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning. The absurdity of Lord *Lincoln's* case is shocking. However [F 3], it is now law. But here, *quâcunque viâ datâ*, Sir *William* cannot recover these freehold lands; for, 1. The trust is at least doubtful, which is sufficient; but, 2. We think the will as to them is not revoked.

The *Postea* to be delivered to the plaintiff [1].

[1] Because he was entitled to recover *part* of the premises.

GRANT *against* ASTLE.

Tuesday 26th June.

One fine cannot be assessed on the admission to *several* copyhold tenements.—If any count in the declaration state *one* fine, although the others state several, and there are entire damages, and judgment for the plaintiff, it is error.—A court of error may award a *venire de novo*.

THIS was a writ of error, from the court of *Common Pleas*, on an action of *assumpsit* by *Astle*, as lord of the manor of *Great Tay*, in the county of *Essex*, against *Grant*, for the fines assessed by the lord, on *Grant's* admission to eight different customary tenements. The *declaration* consisted of three counts. The first stated, that *Astle* was lord of the manor; That the eight tenements—(enumerating and describing them particularly, with their names, and the names of the different parts of which each consisted, where there were different parts of the same tenement with distinct names, and the number of acres which each tenement, or its different parts, by estimation contained)—were, and, for time immemorial, had been, parcel of the said manor, and customary tenements of the said manor, *demised and demiseable* by copy of court-roll of the said manor, by the lord of the said manor, or by his steward, or deputy steward of the courts of the same manor

[723]

[F 3] Lord *Mansfield* used similar expressions with respect to the Earl of *Lincoln's* case in *Roe* v. *Griffiths*, 4 *Burr*. 1460, and they are referred to as a strong authority, in support of the doctrine of revocation by subsequent conveyance, by *Ashhurst*, J. in *Goodtitle* v. *Otway*, 7 *T. R*. 420, and 1 *B. & P*. 576.

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manor for the time being, to any person or persons entitled to take the same in fee-simple or otherwise, at the will of the lord, according to the custom of the said manor; and that within the manor there was a custom, that every customary tenant, upon his admission to any customary tenement, parcel of the manor, by the lord or his steward, or deputy steward, should pay to the lord, *a reasonable sum, to be assessed by him*, or his steward, or deputy steward, for a fine for such his admission to such customary tenement: It then stated eight several admissions of *Grant*, by the deputy steward, to each of the eight customary tenements respectively; That the *first* was of a large annual value, *viz.* of the annual value of £23. 8*s.* 9*d.* and that *Astle*, at the time of the admission of *Grant* to this first tenement, did assess or appoint the sum of £46. 17*s.* 6*d.* as and for a fine, for his admission to that tenement, to be paid by *Grant* to *Astle*, at the messuage called the *Guildhall*, in *Great Tay aforesaid*, being the place where the courts for the manor were usually holden, at 12 o'clock, *A. M.* on *Thursday*, the 20th of *August*, then next ensuing; That the said £46. 17*s.* 6*d.* was a *reasonable sum* of money to have been paid to *Astle* by *Grant*, for his admission to that tenement; and then an *assumpsit* by *Grant* for the £46. 17*s.* 6*d.*; Then similar separate allegations with regard to the several fines of £4. 10*s.*; £2. 12*s.* 6*d.*; £11. 18*s.* 0*d.*; £3. 0*s.* 0*d.*; £1. 10*s.* 0*d.*; £7. 10*s.* 0*d.*; and £24. respectively, for the seven other customary tenements [1]. The second count stated, That, "whereas *Grant*, afterwards, *to wit, &c.* was indebted to *Astle* in the further sum of £98. 18*s.* 4*d.* for *a certain other fine* due, and of right payable from the said *Grant* to the said *Astle*, as lord of the manor of *Great Tay*, for the said *Astle*'s admission of the said *Grant*, at his special instance and request, *to certain other customary tenements*, parcel of the said manor, to be held by the said *Grant* and his heirs, of the lord of the said manor, at the will of the lord, according to the custom of the said manor, by *certain rents, services, and customs*, therefore formerly due, and of right accustomed, *&c.*" and then an

[724]

assumpsit for the said last-mentioned sum. The third count was for £100. paid, laid out, and expended. *Grant pleaded* the general issue, paying, at the same time, £84. 5*s.* 8*d.* into court; and the cause came on to be tried, before ASHHURST, *Justice*, at the Assizes for the county of *Essex*, when a general verdict was found for *Astle*, with £98. 18*s.* 4*d.* damages, subject to the opinion of the court of *Common Pleas* on a case

[1] Some of the counsel spoke of what is here called the first count, and was so described in the assignment of errors, as consisting of eight counts, there being eight separate *assumpsits* alleged.

case reserved [2]. The court having decided in favour of *Astle, he remitted the £84. 5s. 8d. upon the record, and took judgment for the difference. Grant then brought this writ of error, and, (besides several on the first count, which, not having been insisted on, I omit,) assigned the following errors

*[725]

[2] The case reserved stated, That *Astle* was lord of the said manor of which the tenements mentioned in the declaration were parcel, and that the same were held of *Astle*, as lord of the said manor, by copy of court-roll, at the will of the lord, according to the custom of the said manor, and *that the fine was arbitrary*: That *Grant* had craved admission, on the death of his father, and was accordingly admitted, in fee, to all the said copyhold tenements, upon which admission, a fine of £98. 18s. 1d was assessed; That the said fine of £98. 18s. 1d. appeared to be two years improved value of the said tenements to which *Grant* was admitted, after deducting £2. 19s. 8d. for the *quit-rents*, which were £1. 9s. 10d. a year; That *Astle* had not deducted any thing out of the said fine for *land-tax*; That *Grant* had paid £84. 5s. 8d. into court upon the common rule.

The question stated, upon this case, was, whether the lord of the said manor was bound to allow any sum of money for land tax, out of the said fine. If he was, a non-suit was to be entered; if not, the verdict to stand.

After the case had been argued at the bar, Lord *Loughborough* delivered the opinion of the court, to the following effect:

Lord *Loughborough*,—' This question was truly considered as of great concern to the public at large. It has undergone a very deliberate examination, and we are all of opinion, that the lord of the manor is not bound to make any deduction, for the *land-tax*, out of a fine due for admission on a descent, which is the present case.

' The grounds which led us to this determination lie in a very narrow compass.

' In the *first* place, the land-tax is annual, and, however probable its continuance may be, there can be no legal presumption as to the future intentions of the legislature, and there can be no deduction, by anticipation, of an uncertain future burthen.

' In the *second* place, the tax, though commonly called a tax upon land, is not, in its nature, a charge upon the land. It is a tax upon the faculties of men, estimated, first, according to their personal estate, secondly, by the offices they hold, and lastly, by the land in their occupation. The land is but the measure by which the faculties of the person taxed are estimated; and, where it is intended by the legislature that the burthen should not ultimately rest upon the person charged, a power of deducting is given him by the act; as in the case of re[illegible]s, and other certain outgoings. But no deduction is allowed for fines, which are uncertain.

' In the *last* place, this claim being new, and there being no precedent nor instance to support it, the usage of almost a century is a strong proof, that no such deduction ought to be made, and amounts to a contemporary and permanent exposition of the land-tax acts, in favour of the lord.

' These are the reasons which have weighed in the opinion of the court, to determine this case in the manner I have stated.

' But the subject having led to much curious and interesting enquiry into the nature of copyhold estates, and the progressive advancement of the rights of the tenant, I wish to state a few circumstances that have occurred to my observation, for the inaccuracies of which I only am answerable. I do it in order to excite the investigation of persons

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errors on the second count. 1. That no title was alleged, nor did appear, to be vested in *Astle*, to entitle him to a fine upon the admission of *Grant*; whereas, by the law of the land, a title ought to have been stated, whereby he claimed the said fine. 2. That no custom or prescription was therein stated or alleged, whereby such a fine as was thereby claimed could

sons more able and more diligent; particularly of those who are acquainted with the antiquities of this country, as well as its laws: and I wish it may have the effect of engaging the attention of the plaintiff in the present cause, who, I am sure, is very able to make an enquiry of the nature I am going to point out.

'Copyhold tenures are agreed, by all writers, to be more ancient than the *Norman* government. In some of the most approved authors, the copyhold tenure of land is derived from the state of *villenage*, which now happily forms a very obscure title in the law. It is supposed, that all copyholders were originally villeins, and that, by the mitigation of villenage, and the progress of enfranchisement, the estate grew, by degrees, to be more free and permanent, till it came into the condition of a copyhold.

'I cannot help doubting whether that deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that, in those parts of *Germany* from whence the *Saxons* migrated into *England*, there exists, *at this day*, a species of tenure exactly the same with our copyhold estates, and that there exists likewise, *at this day*, a compleat state of *villenage*; so that both stand together, and are not one tenure growing out of another, and, by degrees, assuming its place. In *East Friezeland*, the duchy of *Brunswick*, and other northern parts of *Germany*, there are villeins in gross, and villeins regardant, with the same rigour which our law formerly knew. There are also copyhold tenants, who are freemen, but whose estates are alienable only by licence, and are transmissible by descent; and, in both instances, they must pass through the courts of the lord. Nay, in the ancient seat of the *Anglo-Saxons*, there exists, at this day, that peculiar descent to the youngest son, which we call *Borough-English*; of which the name shews the original.

'What I have stated I found in a very accurate treatise of *German* law by *Selchow*, one of the professors of the university of *Gottingen*, entitled, "*Elementa Juris privati Germanici*."

'This seems sufficient to negative the idea that copyholders sprang out of villeins. In *England*, villenage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time [F 1].

'It is not difficult to conceive, that, whenever

[F 1] The inference derived from this state of property in *Germany*, appears a very inadequate ground for rejecting the opinion found in our own highest legal authorities, from the earliest times, that copyhold tenure is derived from villenage. Does it necessarily follow, that even in the part of *Germany* here alluded to, the same process has not taken place? May not those copyholders in that country, who are now freemen, have become so by the gradual mitigation of their base tenures established by their laws, in the same manner that the concessions and indulgencies of the lords of manors



could arise or become payable. 3. That it appeared, "*that* "*one gross sum had been assessed, and was claimed as a fine* "*for*

whenever agriculture became an object of respect in the northern and western parts of *Europe*, those who applied themselves to the cultivation of land, though inferior in point of dignity, would be equal in point of freedom, to those whose only profession was arms. The copyhold tenants were husbandmen; their persons were free; and, in that respect, they were as much above the villeins, as, in point of consequence, they were inferior, in a military age, to those who had arms in their hands. Their lands were held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and advantages, founded upon paction express or presumed.

'A fine to be paid on the change of a tenant is almost a constant incident of a copyhold estate, and it does not seem to have been long before the end of the reign of Queen *Elizabeth*, that courts of law interposed to moderate the exercise of the lord's right to a fine, where the custom had left the amount of it uncertain; for it is pretty remarkable,

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nors have, as we are told, grown into law in this country, under the denomination of the custom of the manor; while some remain in their original state of pure villenage, as they did formerly in this country?

It appears clear from *Littleton*'s account of copyhold and villenage tenures, *sect.* 73, and *seq.* and 172, and *seq.* that the same intermediate state of amelioration of base tenures, was then subsisting in this country. It is indisputable, that the simple tenure in villenage once existed to a great extent; it also existed very early in a mitigated state, as described by *Bracton*, under the denomination of villein-socage, of which the services were certain and limited, though base in their nature. Is it not then most probable, that tenure in villenage has grown into copyhold tenure, through the medium of such gradual mitigations? This is the account given by our best writers, *Co. Cop.* § 32, and there is no other history to be given of the fate of the tenures in pure villenage; which certainly did exist, and have not been abolished at any fixed period, or by any precise law, as the military tenures were at the restoration. If the villein tenures do not exist in the shape of copyholds, where are we to look for them, or how to account for their disappearance? It seems too much, therefore, upon this ingenious speculation, drawn from observations in a foreign state, not conclusive in themselves, to give up the authority of our own law writers (who, living much more near the time, were likely to be much better judges of the fact), and the evidence of our own history and antiquities: for there certainly exist many manors in the country, of which the records are preserved for four or five centuries, which exemplify distinctly the change of the villein tenure into the copyhold, by the commutation of base services into specific rents, either in kind, or in money; as well as by furnishing instances, applicable to lands now clearly copyhold, of the different incidents of villein tenure (such as fines for residing out of the manor, for marrying a daughter, *&c.*) once existing in full force, and gradually falling into disuse.

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remarkable, that a question on this subject was depending in the 36th and 37th of Queen *Elizabeth*, in the court of *King's Bench*, and in this court, at the same time: you will find it in 1 *Rolle's Abr.* 507, and in the contemporary reporters. The question was this: under what circumstances a refusal to pay a fine should amount, in a court of law, to a forfeiture of the copyhold estate.

'It was contended, upon the part of the lord, that the mere non-payment of the fine assessed would amount to a forfeiture.

'That proposition appeared too strong, even in a court of law; however, the court of *King's Bench*, in the 36th of *Elizabeth*, held, that, after the demand of a fine by the lord, and the refusal of the tenant to pay, though the fine should be unreasonable, the estate should be forfeited.

'This court, a term or two afterwards, in the case of *Jackman* v. *Hoddesdon*, reported in *Cro. Eliz.* 351, held that, in such case, there was no forfeiture. The court of *King's Bench*, (as has been just stated,) had held the contrary, but the opinion of this court prevailed; and, in the 43d of *Elizabeth*, in the case of *Hobart* v. *Hammond*, reported in 4 *Co.* 27. *b.* the court of *King's Bench*, referring to the case of *Jackman* v. *Hoddesdon*, in the *Common Pleas*, varied their idea, and held, that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report of that case is stated, and the anxiety with which the Judges support the proposition, one would be apt to conclude it had not been of great antiquity.

'A few years afterwards, in the 6th of King *James*, in *Willowe's* Case, 13 *Co.* 1, this point again occurred, and the law was not then taken to be so settled, as for the court simply to say, "the point is so," but the report states a great deal of reasoning and argument to support the position, that the Judges not only might, but ought, either upon the facts appearing upon a demurrer, or upon evidence to go to a jury, to determine, what was a reasonable fine; and, in that case, the court held, that *two* years value was an unreasonable fine.

'Thus then the matter rested; the fine was to be assessed by the lord; and, whether it was reasonable or unreasonable, was a question for the consideration of the court and jury; and it would obviously be subject to much fluctuation and uncertainty. To prove, upon a trial, the annual improved value of land, and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction, that recourse would frequently be had to the court of *Chancery*, which had always relieved against the forfeiture, and taken upon itself, without a jury, to determine what should be a reasonable fine.

'Lord Keeper *Coventry*, in the 5th of *Charles* I. and again, in the 12th of the same reign, (1 *Chan. Rep.* 18. or 33. (*a*), and *ibid.* 51. or 96. (*b*), held, that *one* year's improved value was a reasonable fine—guarding the decree—that one year's value should not be counted a fine certain, but referable to the discretion of the court, whether it was reasonable, and that the payment was then directed, because it was reasonable.

'In

(*a*) *Middleton* v. *Jackson*.

(*b*) *Popham* v. *Lancaste*

" ought to be set and assessed upon each several and respective " tenement [† 155]."

Wood,

'In the 29th of *Charles* II. in the year 1677, Lord *Nottingham*, in the case in 2 *Rep.* in *Chan.* 135. (c), held, that *two* years value was a reasonable fine; and, at the time of this determination, in 1677, two years value was not a much higher payment, than one year's value had been at the time of Lord *Coventry*'s determination. The interest of money had been reduced, and, from that and other causes, the value of land had risen. One years value might be nearly as large as an *aliquot* part of the selling price of land in the 5th of *Charles* I. as two years value at the time of Lord *Nottingham*'s determination. From that time to the present, the idea of two year's value being a reasonable fine, in the case of a fine arbitrary, (or, in the more proper phrase *arbitrable*, (d),) has prevailed uniformly, and the adhering to this rule has been a matter of very great convenience, though it cannot be said to be a matter of strict justice.

'Two years value, the interest of money being six *per cent.* as at the time of Lord *Nottingham*'s determination, is a much larger proportion of the selling price of a copyhold estate, than the same number of years purchase, the interest of money being at five, and four *per cent.* But to follow the variations of price, would create confusion in this property, would occasion a depreciation of it, and is not the true interest of the copyholder. Public convenience, therefore, that great source of law and justice, has established the authority of the rule laid down by Lord *Nottingham*; and, it is to be observed, that the decision was not above eighteen years prior to the first land-tax act. From that time to the present hour, not an instance can be found, where there has ever been a deduction from the two years value, (then fixed as the utmost amount of a fine,) upon account of the land-tax.

'It seems, therefore, to me, much better for the interest of copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of a copyhold estate should be strictly kept to that sum which has subsisted now above a century, namely, two years improved value, without any deduction except for quit-rents, which can hardly be called a deduction, for the lord must allow that which he has received, or is to receive.'

[† 155] The following case has been since decided, *B. R. H.* 24 *Geo.* 3.

WHITFIELD v. HUNT.

Assumpsit, for copyhold fines. The declaration contained, (besides several special counts, in the common form, for so many fines assessed on several tenements,) a general *indebitatus assumpsit*, as follows:

And whereas also the said defendant, afterwards, &c. being a tenant of divers other customary tenements, parcel of the said manor of, &c. was indebted to the said plaintiff, then and still being lord of the said manor, in £78. 5s. for reasonable fines due and payable by the said defendant to the said plaintiff, for and on the admission of her the said defendant, according to the usage of the said manor, into the said last-mentioned customary tenements, with the appurtenances, to hold to

(c) Morgan v. Scudamore.

(d) Cro. El. 351.

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Wood, for the plaintiff in error.—*Law*, for the defendant in error.

Wood insisted, that the second count was bad, and that, if so, as the verdict was general, the judgment must be reversed.—1. In order to support this count, he said, a great many circumstances, essential to entitle the plaintiff to maintain his action, must be presumed and supplied by intendment. [728] 1. There is no allegation of any custom to take fines, and, without such a special custom, no fine is payable. 2. It is not alleged, that the fine was reasonable. 3. It is not stated how it was assessed. 4. Nor how appointed to be paid. 5. Nor that the defendant had notice before the action brought. 6. It is not sufficiently shewn, that the tenements are copyhold, for they are not alleged to have been *demised and demiseable* from time immemorial, *&c.* They are, indeed, called customary, but *that* they may be, and yet not copyhold, nor subject to the payment of fines upon admissions. It is not denied, that *indebitatus assumpsit* will lie for a copyhold fine [3] [☞], but all the circumstances just mentioned are necessary to raise the *assumpsit*, and there is no case in which the court has presumed so many things, even after verdict.—Upon this head of objection he cited *Moore* v. *Lewis (a)*, which was an action of *assumpsit*, and the declaration contained two counts; in the first, the consideration of the *assumpsit* was, that the plaintiff had done the defendant *multum et gratissimum beneficium*, in the second, that he had done him *multa beneficia*. There was a general verdict; and motion in arrest of judgment, because neither of the considerations

to her, her heirs and assigns, for ever, of the lord of the said manor, by the rents, customs, and services, for the same customary tenement formerly due, and of right accustomed, and, being so indebted, *&c.*

The defendant demurred specially; and assigned for causes of demurrer; That it was not alleged, that the tenements were, from time immemorial, customary tenements demiseable, *&c.*; That it was not alleged, that, within the said manor, there had been a custom to pay a fine on admission: That it was not shewn, by whom the admission was made, *nor that any assessment was made;* That the custom of the manor was not set out, nor how many fines were due, and what each fine amounted to, nor how the same were assessed, nor what fine was due for each tenement.

Touchet, for the plaintiff.—*Wood*, for the defendant.

Buller, Justice, said, the question was only, whether a *general indebitatus assumpsit* will lie for copyhold fines, and that it had been expressly decided, that it will, in a case of *The Duke of Devonshire* v. *Craddock*, *C. B. H.* 27 *Geo.* 2.

Judgment for the plaintiff.

[3] It was solemnly decided that *assumpsit* will lie, in the case of *Shuttleworth* v. *Garnet*, cited *infra*, p. 729, by the opinion of *Dolben*, *Gregory*, and *Eyres*, Justices, against that of *Holt*, Chief Justice.

[☞] So, a *general indebitatus assumpsit* will lie for tolls, *B. R. H.* 27 *Geo.* 3. 1 *Term Rep.* 616.

(a) *B. R. E.* 21 *Car.* 2. 1 *Ventr.* 27.

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tions were sufficient, especially not the last, for that some particular service ought to have been alleged; and the court held clearly, that, nothing being particularly expressed in the consideration of the second promise, and entire damages being given, the plaintiff could not have judgment. He also cited *Elkin* v. *Wastell(b)*, where, upon a writ of error, the court agreed, that land could not be *intended* to be copyhold, but must be so alleged.—But, 2. He contended, that there was another objection, which was decisive, *viz. that* assigned as the third error on the second count. He said he took it to be quite settled, that there cannot be one gross fine for several distinct tenements[F 2]; and it was impossible to read this count and not to see that the fine was for divers tenements. The words are "*a certain other fine*," and "*certain other customary tenements;*" not "*a certain other customary tenement.*" This must mean more than one tenement. It goes on farther, and states them to be held by "*certain rents, services, and customs;*" and, if there is a plurality of rents and services, there must also be a plurality of holdings. In the first count, the words customary tenements, are manifestly used to express several distinct tenements, and there cannot be a better way of explaining the meaning of one part of the declaration, than by comparing it with the other part.—On this head, he relied on *Hobart* v. *Hammond (c)*, where it was expressly resolved, that, when a copyholder has several lands held by several services, by copy, there the lord ought to assess and demand the fines severally for every parcel which is so severally held; *Taverner* v. *Cromwell (d)*; and *Hitch* v. *Wallis*, before BLACKSTONE, *Justice*, at the *Lent* Assizes for the county of *Cambridge*, 17 *Geo.* 3.

[729]

Lord MANSFIELD desired *Law* to confine himself to *Wood's* second objection.

Upon that point, *Law* said, it ought to be considered, that, here, the objection was made after the verdict, not on a demurrer, or at the trial, as in the case of *Hitch* v. *Wallis*, in which case the plaintiff would have given evidence of one gross consolidated fine for divers tenements. The court in this case will give to the word "*tenements*," such a sense, if possible,

(b) *B.R.M.* 14 *Jac.* 1. 3 *Bulstr.* 230.

(c) *B. R. M.* 42 & 43 *El.* 1. *Co.* 27. *b*, *S. C. Moore*, 622, and *Cro. El.* 779, by the name of *Dalton* v. *Hammond.*

(d) *B. R. T.* 26 *El.* 4 *Co.* 27, *a.*

[F 2] When a tenement has once been held by two, as tenants in common, it remains divided into two distinct tenements, notwithstanding it is held afterwards by one person. *Attree* v. *Scutt*, 6 *East*. 476.

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possible, as will support, rather than overturn the count. "Tenements," as defined in *Coke Littleton* (e), means, any "corporate inheritances," or any "inheritances issuing out "of those." It may stand for *messuages and lands*, and, if you translate the sign into the thing, the declaration will run, "certain other customary messuages and lands," which would certainly be sufficient, as the fine may be supposed to have been assessed for one copyhold estate composed of different parts, as houses, arable grounds, &c. As to the words, "rents, services, &c." in the plural, one copyhold estate may be held by several different sorts of rents, and services, to be paid, and performed, at different times. In *Shuttleworth* v. *Garnet*, as reported in several different books (b), the declaration was on a general *indebitatus assumpsit* for a *fine*, payable on the death of every lord, and assessed on the defendant, as tenant *quorundum custumariorum tenementorum* (c), and, upon a motion in arrest of judgment, it was determined that the action lay [3] [☞]. So, in the case of *The Mayor of Exeter* v. *Trimlet* (d), where—on a general demurrer to an action of *assumpsit* for petty customs, in which the declaration contained two counts, the first setting out a prescriptive right, and the second being a general *indebitatus assumpsit*, for a certain sum due for petty customs—the demurrer was over-ruled, and WILLES, *Chief Justice*, in delivering the judgment of the court, said they gave no *positive* opinion as to the *second* count, but inclined to think it was well enough upon a general demurrer, and that, if the defendant had pleaded *non assumpsit*, the plaintiff, at the trial, would have been obliged to shew his right to the petty customs. Surely the plaintiff, here, is entitled to, at least, as much advantage after verdict, whatever might have been the case upon a special demurrer. There, it is said, the plaintiff must have *proved* his right. Here, the court will presume, that the right was proved, and no Judge at *Nisi Prius* would have suffered evidence to be produced of one general consolidated fine for several copyholds: It must be intended that the proof was either of one estate, or of several assessments. If the court should think "tenements" in the plural, cannot be interpreted to mean one estate composed of different parts, they will reject the letter *s*, rather than turn the plaintiff round.

[730]

The

(e) *Co. Litt.* 19, *b.*

(b) *B.R.M.* 1 *W.* & *M. Carth.* 90. 3 *Mod.* 239. 3 *Lev.* 261. 1 *Show.* 35. *Comb.* 151.

(c) *Carth.* 91.

[3] The present question does not appear to have been made in that case; the only point argued being whether *assumpsit* was a proper form of action. *Vide supra*, p. 728. *Note* (3).

[☞] *Supra*, 728. *Note* [☞].

(d) *C. B. T.* 32 & 33 *Geo.* 2. 2 *Wils.* 95.

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The word "parcel" may assist to shew that only one copyhold was meant.

Lord MANSFIELD,—I have exceedingly lamented, that ever so inconvenient and ill-founded a rule should have been established, as that, where there are several counts, entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning, that the jury has assessed damages on all, although, they in truth, never thought of the different counts, but the verdict was so taken, from the inadvertence of counsel in the hurry of *Nisi Prius*. And, what makes this rule appear more absurd, is, that it does not hold in the case of criminal prosecutions; for, when there is a general verdict of *guilty*, on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient[† 156]. But, in civil cases, the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases to be amended by the Judge's notes (*a*)[F 3]. *That* might have been done, in this instance, in an earlier stage of the proceeding, but cannot now after judgment.

[731]

BULLER, *Justice*,—The court may grant a *venire de novo*[F 4]. A good cause of action is shewn in the first count; and that it is true, appears by the verdict; but the plaintiff has also had damages assessed to him on a count in which he has not shewn any cause of action. The court, under these circumstances, may send the case back to have damages assessed only on that count, on which, in point of law, he is entitled to recover.

The court then said, there was no doubt but a *venire de novo* might be granted by a court of error: That it had been done by the House of Lords, and was not a new practice, for, upon an enquiry made by this court on a late case from *Ireland*, a great many instances had been found.

A *venire de novo* awarded [4] [† 157].

[† 156] *Vide Regina* v. *Ingram*, *H.* 13 *Ann.* 1 *Salk.* 384.

(*a*) *Eddowes* v. *Hopkins*, *B. R. E.* 20 *Geo.* 3. *supra*, p. 376.

[4] The cause came on to be tried, on the *venire de novo*, before *Ashhurst*, Justice, at the *Lent* Assizes for the county of *Essex*. 22 *Geo.* 3. when the jury, upon the evidence, thought that the sum of £46. 17*s.* 6*d.* stated to have

[F 3] Such amendment may be made at any time by the judge who tried the cause, though of a different court, even after final judgment, error brought, joinder in error, and a day appointed for argument. *Doe* v. *Perkins*, 3 *T. R.* 749.

[F 4] In *Lickbarrow* v. *Mason*, 6 *T. R.* 131, and again in *Bird* v. *Appleton*, 1 *East.* 111, Lord *Kenyon* referred to the present case, as establishing the point there ruled, that on a *venire de novo*, the party succeeding can only have the costs of the last trial.

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have been assessed as a fine on the admission to the first of the eight tenements, exceeded two years value, and that the fine ought only to have been £46. 4s. 3d. *Ashhurst*, Justice, was of opinion, that the plaintiff could not have a verdict for that smaller sum, and must recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counsel, however, insisting strongly that he might recover according to whatever the jury should find the two years value to be, a verdict was found for the plaintiff, by consent, on that ground, with liberty to enter the verdict for the defendant, if the court should think the plaintiff was bound to prove the exact sum laid.

In *Easter Term*, 22 *Geo.* 2. this question was argued, by *Rous*, *Erskine*, *B. Hunter*, and *Law*, for the plaintiff, (*Astle*,) and *Peckham*, and *Mingay*, for the defendant; and, in the same term, on *Saturday*, the 11th of *May*, Lord MANSFIELD delivered the opinion of the court in favour of the defendant, as follows.

Lord *Mansfield*,—The only count in the declaration which is now material, is for several fines for admission to several copyholds; the declaration states, a custom for every customary tenant to pay a reasonable fine upon his admission, to be assessed by the lord, &c.; that the first tenement was of a large annual value, *viz.* of the annual value of £23. 8s. 9d.; that the lord had assessed £46. 17s. 6d. as a fine for the defendant's admission to this tenement, and that this sum was a reasonable fine. On the evidence, it appeared, that the fine should have been only £46. 4s. 3d. *that* being the full amount of two years value; and the question now is, whether the plaintiff can, in this case, recover a smaller sum than the fine assessed. Two things are necessary parts of this custom: 1. The fine must be *assessed*: 2. It must be *reasonable*. The lord says, in his declaration, that he has *assessed* £46. 17s. 6d. for a fine, and that this sum was *reasonable*, and brings his action for that precise sum. The question for the jury was, whether £46. 17s. 6d. was a reasonable fine, and they found it was not, therefore the plaintiff is not entitled to recover. He has not assessed two years value, but a precise gross sum; and by what rule he went in assessing that sum does not appear upon the record. It is true, he has averred, that the estate is of a large yearly value,—*viz.* of the yearly value of £23. 8s. 9d.—but that is no averment of what the yearly value really is. And the [732] averment in this case is totally immaterial. It would have been enough if the plaintiff had stated, that he had assessed the sum of £46. 17s. 6d. as a fine, and that such sum was reasonable; and it would *then* have been matter of evidence, just as it was on *this record*, whether the sum assessed exceeded two years value or not, because that is the established criterion whether it be reasonable or not. In the present case the duty is numerically certain, for it is not assessed with relation, and in proportion, to the annual value, but is fixed at a gross sum. The only case on this precise subject is *Titus* v. *Perkins* (*a*), which is reported in *Skinner* (*b*), *Carthew* (*c*), *Levinz* (*d*), and 3 *Modern* (*e*). The *Chief Justice*, there, says, "If the lord "demand more than he ought, he may "make his demand *de novo*, for the "Judge, in case of a *greater* demand "than is due, ought not to adjudge as

(*a*) *C. B. H.* 1 & 2 *Jac.* 2.
(*b*) *Skinn.* 247.
(*c*) *Carth.* 12.
(*d*) 3 *Lev.* 249. 255.
(*e*) 3 *Mod.* 132. Reported also in *Comberb.* 43.

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"as much as is due to the lord, and "bar him for the residue, but ought "to adjudge against him for the "whole, and that his entry was tortious, *if he had entered*, and put him "to a new demand *(f)*." This goes to the demand itself, and is not confined to the case of a forfeiture, and there is no such distinction made in that case—(which had been insisted on at the bar.)—The *gist* and foundation of every action must be proved as laid in the declaration. This action is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way. The cases cited for the plaintiff,—*viz.* of debt on a foreign judgment *(g)*; or against a tenant for *double the value of the land*, when he holds over under the statute of 4 *Geo.* 2. c. 28. *(h)*; or for *treble the value* for not setting out tithes, under the statute of *Edw.* 6. *(i)*; or of *assumpsit* for a total loss on a policy of insurance, when there has been only a partial loss *(k)*;—are not at all applicable to the present case; for, in all of those, the *gist* of the action is supported, and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the jury shall find to be the value or the damage. We give no opinion, whether the lord might not have assessed a fine for two years value, and made that solely the foundation of his declaration. In *Titus* v. *Perkins*, a custom to have a year's value, generally, for a fine, was held to be good. But however that might be, it is very clear that the evidence here did not support the declaration, for the plaintiff has no right to any thing but the sum assessed; the duty arises upon the assessment, and *that*, by the evidence, is proved to have been illegal, and void. Therefore, the case stands as if no assessment had ever been made, and, consequently, the plaintiff's right, to demand a fine is not yet complete. Therefore, we are all of opinion with the defendant [F 5].

There was, accordingly, judgment for the defendant, because, as the fine for the first tenement was to be deducted from the damages, he had paid more into court than the plaintiff was entitled to recover.

[† 157] *Vide Harwood* v. *Goodright*, *B. R. T.* 14 *Geo.* 3. *Cowp.* 87. 89. 91. *Qu.* therefore, as to this point in the case of *Street* v. *Hopkinson*, *B. R. M.* 10 *Geo.* 2. 2 *Str.* 1055. ☞ In the *Mayor of Shrewsbury* v. *Kynaston*, *Dom. Proc.* 31st *March*, 1737, 2 *Str.* 1051, 4 *Br. Cases in Parl.* 271, on a writ of error from *B. R.* the House reversed the judgment, and ordered the court of *B. R.* to award a *venire de novo*. In *Trevor* v. *Wall*, *B. R. E.* 26 *Geo.* 3. 1 *Term Rep.* 151, the court said there was no instance of a court of error granting a *venire de novo*, when the proceedings had originated in an inferior court. But where they originated in a court of great sessions in *Wales*, a *venire de novo* was granted in the case of *Davies* v. *Pierce*, *B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 125. *Vide Galbraith* v. *Neville*, *supra*, p. 6. Note [☞ 2].

(f) *Skinn.* 249.

(g) *Walker* v. *Witter*, *M.* 19 *Geo.* 3. *supra*, p. 1.

(h) *Vide Doe* v. *Jackson*, *E.* 19 *Geo.* 3. *supra*, p. 175.

(i) 2 & 3 *Edw.* 6. c. 13.

(k) *Gardiner* v. *Croasdale*, *B. R. H.* 33 *Geo.* 2. 2 *Burr.* 904. 1 *Blackst.* 198.

[F 5] This doctine was confirmed, and carried still farther, in the case of Lord *Northwick* v. *Stanway*, 3 *B. & P.* 316: where, at the court, the lord assessed

1781.

Tuesday, 26th June.

EDEN and Another *against* PARKISON.

Under a warranty in a policy of insurance, *that the ship and cargo are neutral property*, it is sufficient that they are neutral when the risk commences.

[733]

THE plaintiffs insured the ship the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*; *warranted a neutral ship and neutral property*." The ship being captured in the course of her voyage by some *English* men of war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating, in their declaration, that the defendant subscribed the policy on the 28th of *November*, 1780, and averring, that the ship and cargo were, *at that time*, neutral property. The trial came on before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Easter Term*, when a verdict was found for the plaintiffs, subject to the opinion of the court, on a case which set forth, (as far as is material,) as follows:

The ship in question sailed from *L'Orient*, on the voyage insured, on the 11th of *December*, 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December*, 1780, on which day, hostilities having commenced between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of *December*, 1780, and condemned as lawful prize, in the Admiralty court, on the 19th of *February*, 1781.

Smith, for the plaintiffs,—*Howorth*, for the defendant.

For the plaintiffs, it was contended, that the warranty was complied with by the neutrality of the ship and cargo at the time when the voyage commenced. It is a general principle, laid down by BLACKSTONE, *Justice*, in his Commentaries, "That a warranty can only reach to things in being at the "time of the warranty made, and not to things *in future*; as "that a horse *is* sound at the buying him, not that *he will* be "sound two years hence (*a*)." In the case of *Woolmer* v. *Muilman* (*b*), where the warranty was in the same words as here,

(*a*) 3 *Blackst. Comm.* 165.

(*b*) *B. R. T.* 3 *Geo.* 3. 3 *Burr.* 1419. 1 *Blackst.* 427.

sessed the fine at £100. but of especial favor remitted £40. thereof; the jury found the tenement worth £30. *per annum*, and it was held, that the lord could not retain his verdict of £60. for the fine.

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here, the judgment of the court was for the defendant, because the ship and goods were not neutral from the first [1]. There was no fraud upon the defendant in this case. The insurer is to inform himself "of the probability of safety from the *continuance* of peace;" as was laid down by Lord MANSFIELD in the case of *Carter* v. *Boehm* (c). If, indeed, the property had ceased to be neutral by the act of the party himself, the case would have been different. But he is not answerable for the consequences of a war breaking out during the voyage. To make him so, express words ought to have been used; otherwise the construction is to be in the largest and most advantageous way for the insured, according to the principle of the decision in the case of *Gordon* v. *Morley* (*d*). The plaintiffs were ready to have proved, at the trial, that the *premium*, at the time of this insurance, would have been the same if the warranty had been "*Dutch property*," instead of "*neutral property*."

For the defendant, it was said, that this was a new question, and called for peculiar attention, as it would affect a great deal of property. It is certainly a question of construction upon the face of the policy; but, both from the words, and from the nature of the subject, it must be interpreted to mean a warranty co-extensive with the voyage. It is admitted by the argument on the other side, that, if the neutrality had ceased before the ship sailed, the under-writers would not have been liable. But what expression of intention is there, that the warranty should not extend throughout? There are no restraining words. The sense is the same as if the policy had run, "warranted neutral ship, and neutral property at "*L'Orient*, and from *L'Orient* to *Rotterdam*." If the words were to be thought equivocal, yet the nature of the thing speaks in favour of this construction. The merchant proposes to insure the ship and cargo: Upon this the under-writer requires a description of the subject-matter of the insurance: The

[1] It does not appear very distinctly from the state of that case in 3 *Burr.* that the ship and goods were not neutral at the time of the contract, or of the sailing. It is only said, "The "ship, *at and before* the time she was "lost, was not neutral property, *as* "*warranted* by the policy, (3 *Burr.* "1420.") It may be collected, however, upon taking Sir *James Burrow*'s account of the case, and Mr. Justice *Blackstone*'s together, that they were not neutral at the time of the contract. The point there made, as appears from *Blackstone*, was, that the warranty was tantamount to a warranty *free from capture*, and that, the loss having happened by foundering at sea, was not within the meaning of the warranty. But the court held, that, as the warranty was false, it was no contract.

(c) *B. R. E.* 6 *Geo.* 3. 3 *Burr.* 1905. 1910. *Blackst.* 593, 594.

(d) *N. Pr. H.* 20 *Geo.* 2. 2 *Str.* 1265.

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The merchant answers, "I warrant it neutral." This puts an end to all enquiry about the country,—whether *Dutch*, *Swedish*, *Norwegian*, &c. Surely, if it had been mentioned that the property was *Dutch*, the under-writers would have insisted on a much higher *premium*, for there was, at the time of the insurance, an universal rumour of a war between this country and *Holland*. At the trial, this was compared to the case of a warranty to carry a stipulated number of men, or so many guns. But those instances do not resemble this. If guns are thrown overboard to save the ship in a storm, *that* is a circumstance arising out of the very risk insured against, [735] *viz.* sea hazard; and, if some of the crew die, it cannot be supposed that the insured meant to undertake that men should be immortal. In the case of *Lilly* v. *Ewer* (c), the warranty was "*to* sail with convoy from *Gibraltar*;" and, because there were no restraining words, it was held that the convoy must be for the whole voyage. Suppose there had been a voyage for two or three years—as to *China*, &c.—it cannot be thought that the under-writers would have been satisfied, if the property happened to be neutral at the commencement of the risk, and, without some large addition of *premium*, would have taken the chance of war during so long a voyage upon themselves. It is the understanding of all persons conversant with the subject, that, unless there be restraining words, the warranty extends to the whole duration of the voyage. The cases cited on the other side do not apply: They prove principles which the defendant has no occasion to dispute.

Lord MANSFIELD told *Smith* he had no occasion to reply.

Lord MANSFIELD,—Many points have been gone into on both sides, which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question, here, is, what is the meaning of this policy. I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship, and her cargo, at and from *L'Orient* to *Rotterdam*. The insured warrant them neutral, and the defendant would have the court to add, by construction, "And so shall continue during the whole "voyage." The contract is not so. The insured tell the state of the ship and goods *then*, and the insurers take upon themselves all *future* events, and risks, from men of war, enemies, detentions of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of war. If it made a difference what country the property belonged to, the under-writers should

(c) *H.* 19 *Geo.* 3. *supra*, p. 72.

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should have enquired. The risk of future war is taken by the under-writer in every policy. By an implied warranty, every ship insured must be tight, staunch, and strong; but it is sufficient if she is so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the under-writer will continue liable. The case of *Lilly* v. *Ewer* turns quite the other way. The decision there was, that the ship must sail with convoy according to the usage of the trade; *i. e.* convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time; not that they shall continue.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The case of *Lilly* v. *Ewer* is much against the defendant, for it was not contended, there, that the ship must *continue* with the convoy during the whole voyage.

The *Postea* to be delivered to the plaintiffs [† 158] [F].

[† 158] *Vide Salucci* v. *Johnson*, *B. R. H.* 25 *Geo.* 3. & *Tyson* v. *Gurney*, *B. R. H.* 30 *Geo.* 3. 3 *Term Rep.* 477.

LOWE and Others *against* WALLER.

Tuesday, 25th June.

THIS was an action on a bill of exchange, tried before Lord MANSFIELD at *Guildhall* at the Sittings after last [illegible]

When, upon a negotiation for a loan of money, the lender says he cannot advance cash, but will furnish goods, which the borrower takes and sells by the intervention of a person recommended by the lender, if a security is given [illegible] made payable at a future day, for a sum exceeding the value of the goods and 5 *per cent.* interest, this is an usurious loan, and the security void; and a bill of exchange given upon an usurious consideration is void, even in the hands of an indorsee, for valuable consideration, without notice of the usury [F 1].

[F] This is one of the cases in which the assured was allowed to recover for a loss by British capture, the objection not having been taken; but where that defence has been set up, it has been decided that no insurance can protect against such loss. See *Furtado* v. *Rogers*, 1 *B. & P.* 191: and other cases cited in the notes to *Planchè* v. *Fletcher*, *supra*, 253, *a*.

[F 1] But if there is no usury in the inception of a bill, a subsequent indorsement for an usurious consideration will not avoid it in the hands of an innocent holder. *Parr* v. *Eliason*, 1 *East.* 92, and see *Cardwell* v. *Martin*, 9 *East.* 191.

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last *Hilary Term* [1]. The plaintiffs *declared* as indorsees of *Harris* & *Stratton*, to whom the bill was stated to have been indorsed by *Laxton*, the drawer and payee. The defendant was the acceptor. The defence was, that the bill was given upon an usurious contract between *Harris* & *Stratton*, and the defendant. This was controverted by the plaintiffs; but, they also insisted, that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury; and it was argued, that although it should appear that the original transaction was usurious, still the defendant was answerable to them.

Upon the evidence, the case was this:

Waller, a commissioner of the stamp duties, had employed one *Lemon*, a money-broker, to raise the sum of £200. upon the bill in question. *Harris* & *Stratton*, hearing of this, sent their broker to *Lemon*, to enquire whether *Waller* wanted *money*, and he told the broker he believed he did, for, to his knowledge, he had a bill to pay in a few days. The broker said his principal would advance £100. *in money*, and £100. *in goods*, but that the goods should be choice sorts, and he should not lose by them; that he should have them at the warehouse price. *Lemon*, upon this, went and informed *Waller*, that *Harris* & *Stratton*'s broker had been with him; and *Waller* asking him how they would deal, he told him what had passed, and that the broker had appointed him to go with *Waller*, to *Harris* & *Stratton*'s warehouse, the next day. *Waller*, agreeably to this appointment, went, along with *Lemon*, the next day, and found *Harris* & *Stratton* at their warehouse; who made an apology to *Waller* for not having any *money* at that time, but only *goods*; and desired the business might be let alone for a few days. *Lemon* called several times after this, to get a day fixed, and told them, as he had mentioned before to their broker, that *Waller* wanted *money*, in order to pay several demands. In the course of about three weeks, *Harris* & *Stratton* said to him, that, if *Waller* would come the next day, they would give him £50. and he and *Waller* accordingly went the next day. When they came, one of the partners went out, and returned in a little time, saying he could not get any money, but, if *Waller* would take the whole in goods, he should have them directly. *Waller* agreed; and the goods, (hosiery ware,) were sorted out by one *Strutt*, a broker, who was present, and delivered to *Waller*, and, at the same time, *Waller* delivered to *Harris* & *Stratton* the bill of exchange, and also an assignment of his salary, as a collateral security in case the bill should not be paid when it should become due. *Strutt* and

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[1] The action was directed by an order of the Court of Chancery, dated the 18th of *December*, 1780.

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and *Lemon* carried the goods to the shop of *Elderton*, an auctioneer, who was a stranger to *Waller*, and who was to sell them, or advance the value. He desired two hours to make his calculation, and, at the end of that time, *Lemon* and *Waller* came to him, and he offered £120. for the goods, saying, it was the utmost they were worth. *Waller* took the £120. it being agreed, that, if they should sell for more, the balance should be accounted for by *Elderton*, and, if for less, that *Waller* should be answerable to him for the difference. Afterwards, *Elderton* delivered an account to *Waller* of the sale of goods, at £117. 2*s.* 2*d.* There was no evidence that the plaintiffs knew of the above transaction, or the circumstances under which the bill had been given.

The question, whether the transaction was a loan of money for more than 5 *per cent.* under colour of a sale of goods, was left to the jury. If they should be of opinion, that it was, it was agreed that a case should be reserved on the other point, being a mere matter of law.

[738]

In summing up to the jury, Lord *Mansfield* told them, that the statute of usury (*a*) was made to protect men who act with their eyes open; to protect them against themselves. Upon this principle, it makes it penal for a man to *take* more than the fixed rate of interest, it being well known that a borrower in distress would agree to any terms. "No "person shall *take*, directly or indirectly, for the loan of "money, *&c.* above the value of £5. for the forbearance of "£100. for a year, and so after that rate for a greater or "lesser sum, or for a longer or shorter time (*b*)." They were, therefore, to consider, whether the transaction between the defendant and *Harris* & *Stratton* was not, in truth, a loan of money, and the sale of goods a mere contrivance and evasion. The most usual form of usury was, his Lordship said, a pretended sale of goods. He then stated the material parts of the evidence, and made some strong observations to shew, that it was not the intention of the parties to buy and sell, but to borrow and lend, and that the contract was, in truth, for a loan of money, though under the mask of a treaty for the sale of goods.

The jury found the contract to be usurious, but if, in point of law, the plaintiffs should be entitled to recover, they assessed the damages at £222. 10*s.* being the amount of the bill, with the interest due upon it.

Upon this, a case was made for the opinion of the court, which,—after setting forth the bill of exchange, bearing date the 27th of *October*, 1778, and payable in three months, with

(*a*) 12 *Anne*, *st.* 2. *c.* 16. (*b*) § 1.

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with the indorsements, in blank, of *Lawton* and of *Harris* & *Stratton*,—stated; "That the bill was given by *Waller*, the "acceptor, to *Harris* & *Stratton*, upon an usurious contract, "whereby more than legal interest was secured. That the "plaintiffs took the bill from *Harris* & *Stratton* for a valuable "consideration, and without notice of the usury."

In *Easter Term*, on *Thursday*, the 3d of *May*, *Dunning* obtained a rule to shew cause, why there should not be a new trial, upon the ground, that the original transaction was not a loan, but a sale of goods, and, therefore, though it might be fraudulent, it was not within the meaning of the statute of Queen *Anne*.

The court expressed a wish, that *both* questions should come on at once; and, upon the first argument, the counsel for the defendant went into both; but, on the other side, they [739] reserved themselves on the *second* point, in order to argue it separately, in case the decision of the court should be against them on the *first*.

On *Friday*, the 11th, and *Monday*, the 14th, of *May*, the *Attorney-General*, and *Davenport*, shewed cause against the new trial. They cited *Symonds* v. *Cockeril* (*a*), where a rent-charge of £20. a year for eight years, and two years more, if *A.* and *B.* should live so long, was granted for £100. and, upon replevin against the grantee, who had distrained for the rent-charge, the plaintiff pleaded in bar, that it was a corrupt agreement, and the court held, "That, if "the original contract was for a rent-charge, *that* is not "usury, but a good bargain and pennyworth, but, if the party "had come *to borrow the money*, and then such a contract "ensued by security, *that* is usury." They also cited the cases of *Massa* v. *Dauling* (*b*), and *Richards* v. *Brown* (*c*) [† 159]; which last case was much agitated and considered in this court, and finally decided in *Trinity Term*, 18 *Geo.* 3. [† 160], and in which, the real and original treaty being for a loan, although it was disguised under the appearance of selling an annuity, it was decided to be within the meaning of the statute.

Dunning, and *Morgan*, for the plaintiffs, contended, that the transaction was really a sale of goods; at an exorbitant and iniquitous price, to be sure; but, still, only a sale, the price

(*a*) *Noy*. 151.

(*b*) *N. P. M.* 19 *Geo.* 2. 2 *Str.* 1243.

(*c*) *Vide* an account of a subsequent part of that case, *E.* 19 *Geo.* 3. *supra*, p. 114.

[† 159] Since reported, *Cowp.* 770.

[† 160] The opinion of the court was delivered in *Easter* Term, 18 *Geo.* 3. in the absence of *Willes*, Justice, as reported by Mr. *Cowper*, but, in *Trinity* Term, *Willes*, Justice, mentioned that he had read a written argument which Mr. *Hargrave* had sent him by the permission of the court, and that it had not altered his opinion, which was the same with that of the rest of the court.

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price to be paid at a future day, and for which future payment, the note and the assignment of the salary were given as securities. The first negociation might be for a loan; but, in the course of the business, it came to be merely a bargain and sale; and as such, however fraudulent and culpable, it was not usury. *Morgan* observed, that, by the statute 37 *Hen.* 8. *c.* 9 (*d*), intituled, "A bill against usury," and revived by 13 *El. c.* 8. (*e*), it was made unlawful to sell merchandizes or wares, and re-purchase them again within three months, at a lower price. This was the only provision, in the acts on this subject, relative to the sale of goods, and, therefore, it was to be inferred, that the legislature did not mean to extend the penalties against usury to other cases of sales, however oppressive, or unfair. He cited *Murray* v. *Hardinge* (*a*); where the court of *Common Pleas* said, that no inequality of price, merely as such, will make a contract usurious (*b*); and *Floyer* v. *Edwards* (*c*), Lord *Chesterfield* v. *Jansen* (*d*), and *Lloyd, qui tam, &c.* v. *Williams* (*e*).

[740]

Lord MANSFIELD,—Before the statute of *Hen.* 8. (*f*), all interest on money lent was prohibited by the canon law, as it is now in *Roman*-catholic countries. This gave rise to many shifts and devices to evade the law. One, which was then the most common, was provided against by that statute; but the prohibition being confined to that particular sort of transaction, usurers were, thereby, put upon other contrivances; and experience taught the legislature, in more modern statutes, not to particularize specific modes of usury, because that only led to evasion, but to enact, generally, that no shift should enable a man to take more than the legal interest upon a loan. Therefore, the only question, in all cases like the present, is, what is the real substance of the transaction [F 2], not, what is the colour and form. This is one of the strongest cases of the sort I ever knew litigated. It is impossible to wink so hard, as not to see, that there was no idea between the parties of any thing but a loan of money. His

(*d*) § 2.
(*e*) § 2.
(*a*) *C. B. H.* 13 *Geo.* 3. *Wils.* 390.
(*b*) *Ibid.* 395.
(*c*) *B. R. T.* 14 *Geo.* 3.
(*d*) *Canc. H.* 24 *Geo.* 2. 2 *Ves.* 125. 1 *Wils.* 286. 295.
(*e*) *C. B. M.* 12 *Geo.* 3. 3 *Wils.* 250. 261. 2 *Blackst.* 722. 792.
(*f*) 37 *H.* 8. *c.* 9.

[F 2] See the opinion of Lord *Alvanly*, C. J. acc. in *Marsh* v. *Martindale*, 3 *B. & P.* 160, where it was held, that discounting a bill at a very long date, if it be merely to cover a loan, is usury.

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His Lordship then recapitulated the striking parts of the evidence, and observed, that the whole complexion of the case shewed, that the only purpose of *Harris* & *Stratton* was, to contrive how to get more than legal interest. They first offered part in cash; then less, playing the defendant on, in order to increase his distress; and, at last, tempted him, by an offer to conclude the business immediately, if he would take the whole in goods; assigning to the last, as their reason for this, that they could not procure the money: They did not act as persons selling goods upon credit, to be paid for at a future day; but as lending on the security of the note and the assignment of the salary. The jury, therefore, had done perfectly right.

The rest of the court being clearly of the same opinion, the rule for a new trial was discharged.

The remaining question was argued, on the case reserved, in this present *Term*, on *Tuesday*, the 19th of *June*, by *Morgan*, for the plaintiffs, and *Davenport*, for the defendant.

[741]

In the case of *Bowyer* v. *Bampton*, reported by *Strange*(*a*), it was determined, that, upon the construction of the statute of 9 *Ann. c.* 14. § 1. a promissory note, given for money knowingly lent to *game* with, is void in the hands of an indorsee for valuable consideration, and without notice; for the words of that statute being, " That all notes, bills, bonds, " judgments, mortgages, or other securities or conveyances " whatsoever, *&c.* where the whole, or any part, of the con- " sideration shall be, *&c. shall be utterly void, frustrate, and* " *of none effect, to all intents and purposes whatsoever*," the court held, that it would be making the note of some use to the lender, if he could pay his own debts with it; and that the indorsee would not be without remedy, for he might sue the indorsor, on his indorsement.

This case having been much relied on by the counsel for the defendant, when they argued the present point, upon the motion for a new trial,—because, as they insisted, the words of 12 *Anne st.* 2. *c.* 16. though not exactly the same, are equally strong, with those just cited from the act against gaming, it was now contended, on the part of the plaintiffs; 1. That the two acts differed essentially as to the present question, and that, both before and since the statute of 12 *Anne*, usury was no bar against third persons not affected with notice; 2. That the case was contrary to other decisions, and not law. 1. *Notes* and *bills* are expressly mentioned in the act of 9 *Anne*, and are omitted in the other. Such a difference, in two statutes which passed so recently the one after the other, must have been intentional, and this being a question on a penal law, the court will construe it with the utmost strictness.

(*a*) *B. R. T.* 14 *Geo.* 2. *Str.* 1155.

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ness. It may, indeed, be said, that a bill comes under the word "*assurance*," used in 12 *Anne*; but it is fair to infer, that, as *the word* "*bill*" itself was, (and as it seems purposely,) omitted, the legislature could not mean to include *the thing* under a general term, and which, in common acceptation, is not extended to bills and notes; they being rather considered as *cash*, than as *assurances* for the payment of money. In all the prior acts against usury, from the reign of Queen *Elizabeth*—13 *Eliz. c.* 8. § 3. 21 *Jac.* 1. *c.* 17. § 2. and 12 *Car.* 2. *c.* 13. § 2.—as well as in 12 *Anne, st.* 2. *c.* 16. the words "*bonds, contracts, and assurances*," are used, and yet there is not a case in the books, from the 13th of *Elizabeth*, till this day, in which it has been determined, that the innocent holder of a bill of exchange shall be precluded, on account of usury in the original transaction, from recovering against the acceptor. Nay, it was expressly and solemnly decided, even in the case of a bond, (*viz.* in *Ellis* v. *Warnes*(*a*), which was long after the statute of *Elizabeth*,) that,—"Where *W*. was indebted in £100. to *A*. upon an usurious contract on a bond, and *A*. being indebted to *E*. transferred the debt to *E*., and *W*. became bound for the same usurious debt to *E*. whose debt was just, and he ignorant of the usury,—the obligation made by *W*. to *E*. was not avoidable for the usurious contract made between *W*. and *A*." Therefore, though *bills* should be considered as within the meaning of *assurances*, still the intention cannot have been to make them void in the hands of persons ignorant of the usury. Indeed it should seem, by the very words of all the acts, that the provision in question was only meant to be applied to securities where an usurious consideration appears *on the face of the instrument*: In all of them, the expression is, "*whereupon*, or *whereby*, "there shall be *reserved*, or taken more than, &c." 2. As to the authority of the case of *Bowyer* v. *Bampton*, it is directly contrary to the doctrine laid down by Lord *Holt*, in *Hussey* v. *Jacob* (*b*) [1], and which is stated by him as founded on previous determinations. "*A*. (says he) wins money of *B*. "and, for a debt which *A*. owes *C*. he appoints *B*. to give "*C*. a bond; 'tis good, because *C*. is an innocent person, and "'twill be the same thing if *A*. is bound with him;" or, as it is expressed in the report of the same case by COMYNS, "If "a bill is given, for money won at play, to the winner, or "order, and the winner indorses it to a stranger, for a just "debt, and the person upon whom the bill was drawn ac-"cepts

[742]

(*a*) *B. R. E.* 1 *Jac.* 1. *Moore*, 752. *pl.* 1035. *Cro. Jac.* 32. *pl.* 6. *Yelv.* 47.

(*b*) *B. R. M.* 8 *Will.* 3. 1 *Salk.* 344. *Com.* 4.

[1] That case arose upon the statute of 16 *Car.* 2. c. 7. § 3. the words of which are nearly the same (as to this point) with those of 9 *Ann.* c. 14.

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"cepts it in the hands of the stranger, the acceptor will be "liable (c)." COMYNS, in his *Digest*, cites this case of *Hussey* v. *Jacob*, and adopts the position of Lord HOLT, as law (d). A contrary decision would be highly inconvenient to trade. Bills circulate like money, but if it become necessary for every man to enquire into the original consideration, before he can take one with safety, their currency will entirely cease.—*Morgan* also cited *Robinson* v. *Bland* (e), and *Rex* v. *Sewell* (f).

The arguments on the other side were; That the word "*assurances*" comprehends bills as much as any other sort of security; and to hold, that an innocent indorsee could make use of a bill given on an usurious contract, would be against the obvious meaning of the words "*utterly void*," in the statute of 12 *Anne*. Wherever the acts against gaming, and those against usury differ, it will be found that the provisions against usury are the strongest. Thus, though the statute of 9 *Anne* makes all *securities* given for money won at play, or lent to play with, void, it does not declare that the *contract itself* shall be void; and the prior act of 16 *Car.* 2. *c.* 7. which says, that *contracts*, and all securities for money *lost* [☞] at play, shall be utterly void (c), does not extend to money *lent* to play with. Therefore, in the case of *Barjeu* v. *Walmsley* (d), it was held, that an action would lie on the *contract* for money knowingly lent to play with; and, in *Robinson* v. *Bland* (e), the same distinction was made. But, by 12 *Anne*, *st.* 2. *c.* 16. not only the security, or *assurance*, but the contract itself, is made void. This shews that the legislature was still more anxious to prevent usury than gaming. Now, as to gaming, the case of *Bowyer* v. *Bampton* is a direct and solemn authority. The decision was after two arguments; and LEE, *Chief Justice*, observed, that what Lord HOLT had said, in *Hussey* v. *Jacob*, was extra-judicial, and that he had seen a report, wherein notice was taken, that all the learned part of the bar wondered at it. Indeed, by the report of the case in *Carthew* (f), the court is only made to say, "that, if the bill had been negotiated and indorsed to "any other person, for value received, *then it might have* "*been another consideration.*" It must be admitted, that the bill, in the present case, was void *at first*. Now, how can a thing void in its origin, be rendered valid by any thing done to it afterwards? If it were to be held, that it should appear on

(c) *Com.* 6.
(d) 5 *Com. Dig* 610.
(e) *B. R. M.* 1 *Geo.* 3. 2 *Burr.* 1077.
(f) *N. Pr. M.* 1 *Ann.* 7 *Mod.* 118.
[☞] To the amount of more than £100. at any one time or meeting.

(c) § 3.
(d) *B. R. H.* 19 *Geo.* 2. 2 *Str.* 1249.
(e) *B. R. M.* 1 *Geo.* 3. 2 *Burr.* 1077. *Law of N. Pr.* 274. *Ed.* of 1775.
(f) *Carth.* 356.

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*[744]

on the face of the instrument, that more than 5 *per cent.* is to be paid, the statute would become almost a dead letter; for what usurer is so unskilful in his trade, as to suffer the usury to appear on *the face of the security? And how easy will it be for the lender to pay away bills on which he himself could not recover, either *bonâ fide*, to persons to whom he is indebted, or colourably, to some secret partner in the business, but whose knowledge of the usury cannot be traced? It is said, it will be dangerous to trade, if third persons cannot recover. But this supposes that usurious contracts are very universal; and, if they are, it is highly proper they should receive a check of this sort. Besides, what greater risk will there be than is run every day, when notes or bills are taken from women who may be under coverture, or from young persons who may be minors, unknown to the persons taking such notes or bills? If *Harris* & *Stratton* are solvent, the plaintiffs will not suffer; and it is the business of indorsees to satisfy themselves with respect to the solvency of the indorsor. In the case of *Ellis* v. *Warnes*, there was an immediate security given to the third person; and so indeed it is supposed to be, in the case put by Lord HOLT, in *Hussey* v. *Jacob*, as reported by *Salkeld* (*a*).

The court took till this day to consider; and now Lord MANSFIELD delivered their opinion to the following effect:

Lord MANSFIELD,—We have considered this case very attentively, and, I own, with a great leaning and wish on my part, that the law should turn out to be in favour of the plaintiffs. But the words of the act are too strong [F 3]. Besides, we cannot get over the case on the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience. It is less mischievous that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorsor, if he cannot recover upon the bill.

The *Postea* to be delivered to the defendant [† 161].

(*a*) *Salk.* 344.

[† 161] *Vide Floyer* v. *Edwards*, *B. R. T.* 14 *Geo.* 3. *Cowp.* 110.

[F 3] But if notes are discounted for an usurious consideration, and transferred to an innocent holder, and the indorsor, who gave the usurious consideration, gives another security to the innocent holder, as a substitute for the notes, the statute does not avoid such substituted security between those parties. *Cuthbert* v. *Haley*, 8 *T. R.* 390.

1781.

Thursday, 28th June.

TAYLOR *against* WHITEHEAD.

A motion may be made in arrest of judgment after a rule for a new trial has been discharged, and at any time before judgment is entered up.—It is not a good justification in trespass, that the defendant has a right of way over part of the plaintiff's land and that he had gone upon the adjoining land, because the way was impa[illegible] from bei[illegible]erflowed by river.

TRESPASS for breaking and entering the close of the plaintiff, at the parish of *Otley*, in *Yorkshire*. The defendant *pleaded*: 1. The general issue: 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the *locus in quo*, to *Otley* bridge on the river *Wharfe*; *that the tenants and occupiers of the* locus in quo *were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next to the river*; that, at the several times when, &c. the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life, and goods; and that he *necessarily* went into, through, and over, the *locus in quo*, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid: 3. That the *locus*, &c. lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river *Wharfe*; that the defendant had a right of way, by prescription, through and over the lane; and, that, because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, &c. *pass or repass*, he did *necessarily* go out of the said way as near to the said way as he possibly could, into, through, and over, &c.

The plaintiff having *traversed* the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause came on to be tried, before Lord LOUGHBOROUGH, at the summer assizes for *Yorkshire*, 1780; and the jury found for the plaintiff, on the general issue and the first special plea, and for the defendant on the last.

In *Michaelmas Term* (*a*), a rule was obtained, to shew cause, why there should not be a new trial on the issue found for the defendant, as having been found against evidence, which rule was, upon argument, discharged (*b*).

Afterwards, *Fearnley* obtained a rule to shew cause, why the plaintiff should not be at liberty to enter up judgment on *that* issue, as well as the others, notwithstanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

[746]

On *Saturday*, the 3d of *February*, cause was to have been shewn against this rule, and *Lee* objected, that it had been applied

(*a*) *Thursday*, 9th *Nov.* 1780. (*b*) *Friday*, 24th *Nov* 1780.

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applied for too late, for that it was in the nature of a motion in arrest of judgment; and, he said, he had always understood the practice to be, that such a motion could not be made after a new trial had been moved for, unless the court, upon granting the rule for a new trial, should have given leave, if that should be discharged, to follow it by a motion in arrest of judgment. It seemed, he said, very unreasonable, that a party should be permitted to avail himself, in so late a stage of the cause, of an objection that might have been taken in the first instance, by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expence and vexation of the trial, and the motion to set aside the verdict, would have been avoided. In answer to this, it was observed, by *Dunning*, that it would be extremely absurd if an objection should be stated to the court, and they should be convinced that the party had not, by law, a right to judgment in his favour, that they should yet be necessitated, by any rule of practice, to pronounce an erroneous judgment in his favour, and so force the other party to bring a writ of error.

After some consideration, and conference with the Master, the court declared their opinion, that a motion in arrest of judgment may be made at any time before judgment is entered up, and that the present motion, being of the same nature, was not too late.

It now appeared, that the officer, by mistake, had entered a verdict for the defendant on all the issues; upon which it became necessary for the plaintiff's counsel to move for a rule to shew cause, why the *Postea* should not be amended, from the judge's notes, agreeably to the finding of the jury, and that the rule then before the court should, in the mean time, be enlarged.

The *Postea* was afterwards amended, and, this day, the question on the validity of the last plea was argued.

Lee, *Davenport*, and *Wood*, for the defendant.—They argued as follows:—It is clear law, established by a number of cases, particularly that of *Absor* v. *French*, in *Shower* (*a*), and *Henn's* Case (*b*), that, where a common highway is out of repair, by the overflowing of a river, or any other cause, passengers have a right to go upon the adjacent ground. So, if the water impairs the banks of a navigable river, which, indeed, is considered as a highway, it is justifiable to go upon the nearest part of the field next adjoining (*c*). No cases are to be found upon the question as to private ways; but there are determinations, the principle of which is, that, where it becomes

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(*a*) B. R. M. 30 *Car.* 2. 2 *Show.* 28. *Lev.* 234.

(*b*) 8 *Car.* 1. Sir *W. Jones*, 296.

(*c*) *Young* v. ———. *N. Pr.* before Lord *Holt*, 1 *Ld. Raym.* 725.

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TAYLOR against WHITEHEAD.

becomes impossible for a person to exercise his right without a trespass on the soil of another, the law will *excuse* the trespass. Thus, in *Dike* & *Dunston's* Case (*d*) [F], it is stated [1], from the Year-book of 6 *Edw*. 4. "That, if a "man is to lop his tree, and *he cannot do it unless it fall* "*upon the land of another*, then he may well justify the felling it upon the other's land, because, otherwise, he could "not lop it at all." So, in the case of *Miller* v. *Fandrye*, reported in *Popham* (*e*), "A man may justisy chasing sheep "with a dog upon another man's ground, if he cannot otherwise drive them off his own." And, in that case, there is one cited from 22 *Edw*. 4. 8, where it was held, "That, for "necessity, a man who plows may turn his plow on the land "of another;"—(BULLER, *Justice*, "There a *custom* was "laid.")—And another from 8 *Edw*. 4. where it was laid down, "That, if a tree grow in a hedge, and the fruit fall "into another's land, the owner may go upon the land and "fetch it." These are all trespasses occasioned, as in the present case, by the unavoidable interruption of the exercise of private rights in the regular way. It is of no consequence, upon this issue, who is bound to repair the road, because the justification is not, that the road was out of repair and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was *impossible* for the defendant to pass along the way, and, therefore, he *necessarily* went out of it. If the question who ought to repair is said to be the material part of the case, and that the issue tried on the second special plea was immaterial, the motion ought to have been for a repleader; but, as the plaintiff took the issue, the court

(*d*) *B. R. M.* 28 & 29 *El. God.* 4. 52.

[1] By counsel.

(*e*) *B. R. E.* 2 *Car.* 1. *Poph.* 161. —But that part of the Reports is not by *Popham*.

[F] The decision in that case goes a considerable length towards determining the present in favour of the plaintiff. It was there held, that the defendant, being entitled to a private way over the plaintiff's land, which was cut up with cart wheels, so that he could not *so well* use his way *as before*, could not justify filling up the ruts, and cutting a trench to let the water off: And though, on defendant demanding "what remedy he should have," *Gawdy*, J. observed, that he ought to have pleaded, that he could not use the way *at all;* from whence it might be inferred, that a justification like that which was pleaded in the present case, might be supported: Yet, *Suit*, J. gave an answer, which seems to leave the defendant in much the same situation in which he is placed by the present case. For, said that learned Judge, in answer to the enquiry of the defendant's counsel (as the words are given in this reporter) "*if he went that way before in his* "*shoes, let him now pluck on his* "*boots!*"

court will not grant a repleader on his application (*f*). Supposing it not to be true in all cases, that a person * having a private way over the land of another, may, when the way is impassable, justify going on the adjoining ground; yet, surely, he may, where the land over which the way is, and the adjoining land, both belong to the same person. He, or those under whom he claims, having granted a right of way over his estate, if the usual tract becomes impassable, the right continues, and must be exercised on the neighbouring ground belonging to the grantor.

*[748]

Lord MANSFIELD mentioned, that BLACKSTONE, in his Commentaries, expresses an opinion, that the law of *England* corresponds with the *Roman* law, on this point, extending the right of going on the adjoining ground, when a road is out of repair, to private as well as public ways (*a*), and that COMYNS, in his *Digest*, seems to have entertained the same opinion (*b*).

Walker, Serjeant, for the plaintiff, insisted, that, by the common law, the *grantee* of a private way is bound to repair, unless there is an express stipulation for the grantor to do it. This principle, he said, was clearly deducible from the ultimate determination in the case of *Pomfrett* v. *Ricroft* (*c*), where one having granted the use of a pump, for a term, to another, and the pump having fallen into disrepair, the grantee brought his action against the grantor, and, upon demurrer, the court of *King's Bench* held, (three Judges against TWISDEN,) that it well lay, for that the grantor was bound to repair; but, upon a writ of error to the *Exchequer Chamber*, their decision was unanimously reversed. Now, on this record, he said, it was expressly found, on the first special plea, that the plaintiff was not bound to repair, and, by the second, no custom or duty for him to repair was alleged. The defendant, therefore, must be considered as bound to repair in this case; and, if the road had become impassable by his neglecting to guard against the overflowing of the river by keeping up the banks, it was his own fault, and he could not, on that account, be entitled to trespass on the neighbouring ground.

The court stopped *Fearnley*, who was to have argued on the same side.

Lord MANSFIELD,—The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree

[749]

(*f*) *Supra*, p 396.
(*a*) 3 *Bl. Comm.* p. 36.
(*b*) *Com. Dig.* Tit. *Chimin. D.* 6.
(*c*) *B. R. M.* 21 *Car.* 2. 1 *Saund.* 321.

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agree with my brother *Walker*, that, by common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—If this had been a way of necessity, the question would have required consideration, but it is not so pleaded. It does not appear that the defendant had no other road. There can be no ground for a repleader, for the plea is substantially bad; there is no fact alleged in it which it could serve any purpose to deny, or go to issue upon.

The rule made absolute.

Thursday, 28th June.

ZINK *against* LANGTON.

A *certiorari* cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings from the courts of the counties palatine.

IN last *Easter Term*, on *Wednesday*, the 2d of *May*, *S. Heywood* obtained a rule to shew cause, why an attachment should not issue against the Prothonotary of the court of *Common Pleas* for the county palatine of *Lancaster*, for not obeying a writ of *certiorari*, which had been directed to him, to remove the proceedings in this cause from that court into this[1].

The *Attorney-General*, afterwards, in the same term, obtained a rule to shew cause, why a *supersedeas* to the writ of *certiorari* should not issue.

Both these rules were enlarged till the present term, and, this day, they were spoken to, by the *Attorney-General*, and *Wilson*, in support of the rule for a *supersedeas*, and by *Dunning*, on the other side.

[750]

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[1] The writ of *certiorari* out of this court was directed to the Chancellor of the county palatine, and commanded him, that, "by our writ, "under the seal of our said county "palatine," he should command the Prothonotary to certify the said plaint to him, "that you may certify the "same to us at *Westminster*, &c." In obedience to this, a writ was made out, directed to the Prothonotary, in the nature of a *certiorari*, (but called a *mandate* in the language of that court,) under the seal of the county palatine, but in the King's name, commanding him to certify the plaint, &c. "*to us*, "so that the same may appear to us "at *Westminster*, &c." Neither of the writs assigned any particular ground, but only said, "we being willing," for *certain reasons*, to be certified on a certain plaint, &c.

The circumstances of the case were these: Before the time to plead, in the action below, was expired, the writ from this court, together with another from the Chancellor of the county, consequent upon it, (as mentioned in note[1],) were delivered to the deputy Prothonotary. As he had never before known an instance of such a proceeding, he deferred returning the writ, and, at the next Assizes, WILLES, *Justice*, granted a rule to shew cause, why the plaintiff should not sign interlocutory judgment, notwithstanding the *certiorari*; and, upon shewing cause, and hearing the question, whether the *certiorari* would lie, argued, he permitted the plaintiff to sign interlocutory judgment, but, on condition, that he should not take out execution, till there should be an opportunity of moving this court. A writ of enquiry was afterwards executed, and damages given, to the amount of £672. 4*s*. 6*d*. but final judgment was not signed. The *affidavits* on which the rule for the attachment was moved for, did not state any particular cause, and it came out, when the case was argued, that the attorneys on both sides had *agreed*, that the motion below should be made for signing interlocutory judgment.

It was contended, by the *Attorney-General*, and *Wilson*, that, as there was no instance of a *certiorari* to a county palatine to remove a record *before* judgment, it must be presumed, that the court has no right to issue such a writ; at least, the novelty of the attempt showed there was no necessity for exercising the right, if it really existed. It would be highly inconvenient, particularly in the county palatine of *Durham*, because, there, the pleadings begin, and the cause comes to trial, at the very same assizes; but, if a *certiorari* could be brought, defendants would in general come provided with one instead of a plea; and, if the practice can be supported in the case of the county palatine of *Lancaster*, it must be equally valid in that of *Durham*. But, at all events, they said, the court must have a discretion, and it was sufficient reason to supersede the *certiorari* in this case, that it had been sued out as of course, without any special cause, and obviously only for the purpose of delay; and the court would not grant an attachment for not obeying a writ which never ought to have issued.

On the other side, *Dunning* stated, that there were instances of writs of this sort having issued, and, particularly, one about seven years ago, which could be produced, where there had been a return, but the cause was afterwards made up. The question, on the rule for an attachment, was not, he said, whether the writ had issued properly or not. A *certiorari* had, in fact, been directed to the Chancellor of the county palatine, who had not taken upon him to question the propriety of it, but had thereupon issued his mandate to the Prothonotary.

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Prothonotary. The Prothonotary ought to have obeyed it, without examining whether the defendant was right or wrong in suing it out; and then, when returned, the plaintiff might have moved to quash it, if he had been so advised. The defendant had not stated the reasons for suing it out, in the *affidavits* he had filed, because they were not at all relevant to his motion. As to the agreement between the attorneys, that did not purge the contempt of the officer, which had been incurred before the assizes began.

Lord MANSFIELD,—The only consequence of the writ would have been, that the cause would have gone back to be tried, six months afterwards, by a jury of the same county, and probably before the same Judge; for records in this court, in causes from the counties palatine, are sent to be tried there. There is no doubt but this court may, under particular circumstances, as in a case which calls strongly for a trial at bar, grant a *certiorari* to remove proceedings from a county palatine[2]. But such a writ cannot be sued out, without laying a ground for it, and, as the writ was sued out, in this case, without laying any ground, it issued improvi- [752] dently, and must be superseded; and, as to the officer, he is cleared from any contempt in not obeying it, by the agreement between the attorneys.

The rule for an attachment discharged, and the other made absolute [3] [† 162].

[2] In *Easter Term*, 22 *Geo.* 3. on *Wednesday*, the 1st of *May*, in a case of *Williams* v. *Thomas & another*, a rule was obtained to shew cause, why a writ of *certiorari*, which had been sued out by the defendant as of course, and without any application to the court, to remove the proceedings in an action depending in the court of Great Sessions for the county of *Pembroke*, should not be superseded. On *Monday*, the 13th of *May*, the last day of term, cause was shewn, and an *affidavit* of the defendant produced, by which he swore that from the influence of the plaintiff in the county of *Pembroke*, and his being himself an entire stranger there, he believed he could not have a fair trial. It was said on this occasion, that there were many instances of *certioraris* to counties palatine, and to the court of *Ely*, and several, to remove indictments from the courts of Great Sessions in *Wales*. In general, indeed, those were brought by the prosecutor, for which there is a sort of reason, *viz.* that it being the suit of the King, he may try it where he pleases. But there is one at the suit of a defendant, in the case of *Rex* v. *James*, *T.* 10 *W.* 3. 12 *Mod.* 197. —*Wallace*, and *Douglas*, for the plaintiff.—*Bower*, for the defendant.—Lord MANSFIELD said, that the writ was not of course, and as it had been sued out in this case, without laying any ground before the court, it must be superseded. ☞ In all cases where a defendant applies for a *certiorari*, he must lay some ground for it, before the court, supported by affidavit. *R.* v. *Eaton*, *M.* 28 *Geo.* 3. 2 *Term Rep.* 89.

[3] Final judgment was afterwards signed, and the defendant brought a writ of error in this court, upon which the judgment below being affirmed, a rule was obtained to shew cause, why the Master should not compute interest on the sum given by the jury on the writ of enquiry, from the day of signing

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ing final judgment below, down to the time of the taxation of costs, and why the same should not be added to the costs taxed for the plaintiff. In *Easter Term*, 22 *Geo*. 3. on the last day of that term, *S. Heywood* argued against the rule, and *Wilson* in support of it.

By 3 *Hen*. 7. *c*. 10.—reciting that writs of error were often brought for delay,—it is enacted, "That when "judgment shall be affirmed, or the "writ discontinued, or the party non-"suited, on a writ of error brought by "a defendant or tenant, the person "against whom it is sued out, shall "recover his costs and *damage*, for his "delay and wrongful vexation in the "same, by discretion of the *Justice* (a) "afore whom the said writ of error is "sued." 19 *Hen*. 7. c. 20. recites this act, and that it had not been put in force, and enacts that it shall be thenceforth duly put in execution. *Heywood* contended, that interest could not be allowed under this statute, because, at the time when it passed, and until the following reign, all interest was against law (b), and, therefore, though the word "*damage*" was used in the statute, it must be considered as only tautology, and synonymous to "*costs*." He cited *Penruddock* v. *Errington*, *B. R. M.* 39 & 40 *El. Cro. El.* 587. *Coan* v. *Bowles*, *B. R. M.* 2 *W.* & *M.* 1 *Salk*. 205. and *Bowton* v. *Nicholls*, *B. R. H.* 10 *Car*. 1. *Cro. Car*. 401, as authorities to shew that the statute of *Hen*. 7. is to be construed strictly. But he chiefly relied on the case of *Holroy* v. *Ebizson*, *B. R. H.* 1 *Geo*. 1. 10 *Mod*. 274, as directly in point.—That was an action in *C. B.* on several promises; judgment by default; writ of inquiry; and final judgment; and that judgment affirmed, upon error brought in *B. R.* Upon this affirmance the court was moved, on 3 *Hen*. 7. *c*. 10. that the defendant in error should, besides his costs, have interest allowed him for the sum adjudged due to him, pending the time of the writ of error, from the judgment. The question was fully argued, and, against the application, the practice of the court of *Exchequer Chamber*, which was admitted to be not to allow interest, was relied on, and it was insisted, that costs and damages are often, in law, synonymous expressions, and ought to be so understood in construing the statute of *Hen*. 7. On the other side, it was said, that the court of *Exchequer Chamber*, not having been erected at the time of the statute, was not within the operation of it, and that, though the word "*damna*" does sometimes signify *costs*, yet it never does when joined with "*custagia*;" and that *costs* and *damages* are distinguished in every *Postea*. The court took time to consider, and then delivered their unanimous opinion; "That "the defendant, upon a writ of error "brought into *B. R.* should not have "interest allowed him by way of da-"mages for the sum adjudged due to "him from the time of the first judg-"ment, pending the writ of error, for, "at the time of making the statute of "3 *Hen*. 7. c. 10, all interest was re-"puted unlawful; and, therefore, "that statute could not give it. In "fact, when interest run highest, as "at 10 *per cent*. it had not been al-"lowed. In the *Exchequer Chamber*, "it had never been allowed, and uni-"formity of practice was to be wished "and endeavoured."—*Heywood* then observed, that it was clear, from 2 *And*. 123, as well as from the judgment of the court in the last-mentioned case, that the statute of *Hen*. 7. extends to the court of *Exchequer Chamber*, and that the practice of that court never to allow interest was not only admitted by the parties, and recognized by

(a) *Supra*, 561. *Note* (5).

(b) *Supra*, *Lowe* v. *Waller*, p. 740.

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by the court, in that case, but also stated by Lord *Mansfield*, in the case of *Bodily* v. *Bellamy*, *B.R.M.* 1 *Geo.* 3. 2 *Burr.* 1094. 1 *Blackst.* 267. He acknowledged, that, in one sort of action, *viz. quare impedit*, this court had allowed interest, as in the case of the *Bishop of London* v. *The Mercer's Company*, *B. R. H.* 5 *Geo.* 2. 2 *Str.* 925.; an anonymous case, *M.* 4 *Car.* 1. in *Cro. Car.* 145.; and the case of *The Earl of Pembroke* v. *Bostock*, *M.* 5 *Car.* 1. *Cro. Car.* 173, but, in that action, he said, the interest was allowed as a compensation to the party for being kept out of a living, from which, at the time of *Hen.* 7, a legal annual profit would have been derived; whereas, at that time, no legal annual profit could have been derived from a sum of money; and, therefore, to prevent a party from making interest, by keeping him out of it, after judgment, by a writ of error, was no legal damage.—*Wilson*, on the other side, said, that the only reason he could see for the re-enactment of 3 *Hen.* 7. *c.* 10. by 19 *Hen.* 7. *c.* 20, was, that the Judges had scrupled enforcing the former statute, on account of the ideas entertained, in those days, about the illegality and sin of taking interest. But though it might be unlawful to take interest in the reign of *Hen.* 7. and, therefore, it might not, then, be any damage in the eye of the law to be prevented from making interest of a sum of money, yet, as soon as the legislature permitted interest to be taken, the loss of the opportunity of making interest became a legal damage, to which the act of *Hen.* 7. would apply. He admitted, that interest was not to be allowed as of course upon the affirmance of a judgment by a court of error, but required an application to the court. This had been stated by Lord *Mansfield*, in the case of *Bodily* v. *Bellamy*, and was all that there was in that case applicable to the present.—Lord *Mansfield* mentioned, that what he had delivered on that occasion, was the result of a strict enquiry into the practice of all the courts. He said, the present question was a matter of some consequence, and, therefore, the court would think of it till the next term. In *T.* 22 *Geo.* 3. (*Friday*, the 27th of *June*,) his Lordship delivered the opinion of the court, that "*damage*," in the statute of *Hen.* 7. must mean something different from *costs*, as both words are used: that the question was, what was to be the rule for assessing the *damage*; and that, in this case, the interest ought to be the measure of the damage, the action being for a debt (*a*); but that, in a case of another sort, the rule might be different.—The rule was, therefore, made absolute.

[† 162] *Vide* 2 *Bulstr.* 158.

(*a*) The action was *indebitatus assumpsit.* ☞ If by the course of the court of error, interest is not computed in the allowance of costs, on the affirmance of the judgment, the jury may give interest by way of damages, from the time of signing the original judgment. *Entwistle* v. *Shepherd*, *B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 78. But, in debt on a recognizance against bail in error in the *Exchequer Chamber*, the bail are not liable to pay interest between the time of the original judgment and the affirming the words of the recognizance, in *that* court of error, being, to pay the sum, &c. and such further *costs*, &c. In *B. R.* the bail in error undertake to pay the sum, &c. "as also all such *costs and damages*, "&c." *Frith* v. *Leroux*, *B. R. M.* 28 *Geo.* 3. 2 *Term Rep.* 57. 59. & note (*a*) [F].

[F] For cases on the allowance of interest, generally, as damages, see *p.* 376, *supra*, *note* [F].

1781.

GOODTITLE, Lessee of WINCKLES, *against* BILLINGTON and Another.

Friday, 29th June.

By a devise,—to *A.* and *B.* for their lives and the life of the survivor, but, in case *B.* should marry and have issue, then, after the death of *A.*, to *B.* and her heirs, but, if *B.* should die single and without issue, then to *A.* and her heirs,—*A.* and *B.* take a joint estate for life, with contingent remainders in fee-simple, to each in the alternative.

THIS was an ejectment, tried before Lord LOUGHBOROUGH, at the last *Lent* Assizes for the county of *Buckingham*. A verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved, which stated, (as far as is material,) as follows:

Bernard Chevall, in 1774, made his will, in which, *inter alia*, there was this devise:—" Next, I give and devise unto " my said loving wife, *Elizabeth Chevall*, and unto my " daughter *Anne Chevall*, all that my messuage, tenement, " or farm, (&c. *viz.* the premises in question,) to hold the said " messuage, tenement, *or farm, &c. unto my said wife *Eliza-* " *beth Chevall*, and unto my daughter *Anne Chevall*, for and " *during the term of their natural lives, and the life of the* " *longer liver of them*, in equal proportions, share and share " alike. *But, in case my said daughter Anne Chevall* " *should happen to marry and have issue of her body law-* " *fully begotten*, then, and in that case, *after the decease of* " *my said wife*, I give and devise all and singular the said " messuage, tenement, or farm, &c. *unto my said daughter* " *Anne Chevall, and to her heirs and assigns for ever.* But, " *if my said daughter should happen to die single and un-* " *married, and without issue* of her body lawfully begotten, " then, and in that case, I give and devise all and singular the " aforesaid premises last above-mentioned, *unto my said wife* " *Elizabeth Chevall, and to her heirs and assigns for ever.*"— The testator died on the 27th of *December*, 1774, leaving *Elizabeth Chevall*, his widow, and his daughter *Anne Chevall*, who was by another wife, his heir at law. *Elizabeth Chevall* died on the 30th of *June*, 1775. After her death, *Anne Chevall* suffered a recovery of the premises in question, and devised them to the defendants. She afterwards died unmarried. The lessor of the plaintiff was the brother and heir at law to *Elizabeth Chevall*.

*[754]

The question was, Whether the limitation over to *Elizabeth Chevall*, and her heirs, was barred by the recovery suffered by *Anne Chevall*?

Graham, for the plaintiff, contended, that it was not; for that it was either an *executory devise*, and not too remote in its creation, or a *vested remainder*, after estates for life to *Elizabeth* and *Anne Chevall* and the survivor, and a *contingent* estate-tail to *Anne Chevall*. 1. On the first point, and which

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was founded on the supposition that the limitation to the daughter, in case she should marry and have issue, was in fee-simple, he admitted, that it would be necessary for him to distinguish this case from that of *Luddington* v. *Kime* (a), and other subsequent cases of the same sort. In all those cases, he said, the limitation over was such, that, though the contingency on which it was limited should happen before the end of the original specified duration of the particular estate, yet it must await the natural expiration thereof, before it could vest in possession. Thus, in *Luddington* v. *Kime*, though [755] the tenant for life might have issue-male in his life-time, which was the contingency on which the remainder to such issue-male was limited, yet the estate to such issue-male was not to take effect in possession, till after the regular expiration of the particular estate by the death of the tenant for life. This is essential to the idea of a remainder, according to the definition in *Coke Littleton*, *viz.* that it is "a remnant of an estate, "in lands or tenements, *expectant* upon a particular estate, "created together with the same at one time (b)." So, in *Chudleigh*'s case (c), it is said,—"The rule of law is, that "he in remainder must take the land *when the particular* "*estate determines*, or else the remainder shall be void (d);" —In *Cholmley*'s case (e)—"A remainder ought to take effect "in possession when the particular estate ends (f);"—And, in *Boraston*'s case (g), almost in the same words,—"The "remainder ought to commence in possession, when the par- "ticular estate *ends* (h)."—In like manner, the definition of a remainder in *Noy's Maxims* is, "That it is the residue of "an estate, at the same time appointed over, and *must be* "*grounded* on some particular estate given before, granted "for years or life, and so forth; and *ought to begin in pos-* "*session*, when the particular estate *endeth* (i)." The same principle is laid down repeatedly in the case of *Colthirst* v. *Bejushin*, in *Plowden* (k) [1]. But, here, the limitation to the

(a) C. B. E. 9 *W*. 3. 1 Ld. *Raym*. 203. 1 *Salk*. 224. 3 *Lev*. 431. and stated *supra*, 265.

(b) *Co. Littl.* 143, *a*.

(c) *B. R. H.* 31 *El.* 1 *Co.* 120, *a*.

(d) *Ibid.* 135, *a*.

(e) *Scacc. E.* 39 *El.* 2 *Co.* 50, *a*.

(f) *Ibid.* 51, *a*.

(g) *B. R. H.* 29 *El.* 3 *Co.* 19, *a*.

(h) *Ibid.* 21, *a*.

(i) *Noy's Maxims*, 31.

(k) C. B. E. 4 *Edw*. 6. *Plowd*. 21. 24. 32.

[1] All the definitions here cited, and relied on, point only at this essential quality of a remainder, that it must be so limited as that it may, by possibility, be capable of vesting in possession, *at the latest*, on the regular and natural determination of the particular estate; or, as it is expressed, though rather obscurely, in *Plowden* (25), "that the particular estate *con-* "*tinues when*," (which word means *until*) "the remainder vests." It does not cease to be a remainder, because it

the daughter *Anne Chevall*, in case she should marry and have issue of her body, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her life-time, as soon as the contingency on which it was limited should happen. It is, therefore, not *a remainder*, but *a conditional limitation*. As soon as she had married, and

it may vest in possession on an event which, from the terms, or from the legal nature, of the original limitation, shall defeat the particular estate before its natural or regular expiration. Every remainder limited after an estate for life may vest in possession before the death of the tenant for life, (which is the term of the natural expiration of the particular estate,) namely, in consequence of any forfeiture which he may commit. Some have been inclined to consider conditional limitations after particular estates, (as, for instance, after an estate for life,) but limited to vest in possession on a contingency which *may* happen before the death of the tenant for life, as not being remainders(*l*). Thus, if an estate is given to *A.* for life, provided that, when *C.* returns from *Rome*, it shall, from thenceforth, be to the use of *B.* in fee, it is said this limitation over is not confined to the remnant expectant on the particular estate before given to *A.*, but may interfere with, and in part defeat and supersede, that first estate, instead of awaiting its regular determination; and, therefore, it does not answer the definition of a remainder in *Co. Littl.* 143. *a.* (cited *supra*, p. 755). But this seems too great a refinement. Every estate for life may, by the act of the tenant for life, be defeated, and abridged, before its regular expiration, and, thereby, let in the remainder over in the manner above-stated, and the only difference between such limitations and the others, is, that, in the others, the estate for life is not abridged by the act of the tenant for life, but by some extrinsic event which happens also to be the contingency on which the limitation over depends. But no decided cases that I am aware of, have ever considered limitations of this last sort as not being remainders. They have all the legal incidents and attributes of remainders. They may be barred in the same manner, (*Page* v. *Hayward*, 2 *Salk.* 570.) and are limited to vest in possession, at the latest, on the regular determination of the preceding estate; for, in the case put, if *C.* should not return from *Rome* till after the death of *A.* I conceive the estate to *B.* could not take effect. This, I think, is to be collected from the determination in this very case of *Goodtitle* v. *Billington;* for it seems that it would have made no difference, with regard to the contingent limitation over to the daughter in the event of her marrying and having issue, although the joint estate with the widow, and the survivorship, had been given, not to the daughter, but to a stranger. Indeed, what difference, more than what is merely verbal, can there be shewn to be between an estate to *A. till C.* returns from *Rome*, and then to remain over to *B.* and an estate to *A. provided that* when *C.* returns from *Rome*, it shall, henceforth, be to *B.* Under both forms of expression, *A.* takes an estate for life defeasible

(*l*) *Fearne*, 3d Edit. p. 9, 10.

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and had issue, the estate, to her and her heirs, would have taken effect, and would have enlarged her interest, and merged her estate for life. This limitation to the daughter is, therefore, within the principle of the decision in *Pells* v. *Brown*

defeasible, on the very same event, and *B*. a contingent interest depending on the very same event. The expressions "*till*, &c." and "*then*, &c." in the first case seem to me to be exactly convertible with "*provided that* "*when*, &c." *It shall then*, &c. in the other. Now the first is given as an example of a species of contingent remainders, in the very work where the supposed distinction is stated (*d*). As to the first limitation, in either case, being to *A*. *indefinitely*, or to *A*. *for life*, that can make no difference, because a limitation to *A*. indefinitely, carries a life interest, as effectually as if the words "*for life*" were added. The law supplies them (*e*). In short, the expression and idea of a conditional limitation was originally adopted to evade the necessity of the entry of the heir, in order to take advantage of the defeasance of a prior estate, and all conditional limitations in wills seem reducible, either to the head of executory devises, of which sort was that in *Pells* v. *Brown*, or of contingent remainders, to which the second limitation to the *daughter* in this case of *Goodtitle* v. *Billington*, seems to belong [F].

(*d*) *Fearne*, p. 4. 10.

(*e*) *Co. Littl.* 42. *a.*

[F] This note has been made the subject of very learned and minute discussion in a subsequent edition of *Fearne's Essay;* of which it is not possible to obtain an adequate idea, without reference to the original work, pp. 8. & 334, of the fifth edition. *Fearne* observes that, of all the passages referred to as definitions, only two are properly so denominated, viz. that from *Co. Litt.* 143, *a.* and from *Noy's Maxims;* and he infers from the usage of the words *remnant* and *residue* in those passages respectively, that they necessarily import something not *included* in the particular estate, and by which that estate is not *abridged*. He argues, that the instance suggested in the note, of a remainder coming into possession by forfeiture, cannot apply; because, forfeiture is no one of the regular modes of determination incident to an estate for life. He also disputes the position in the note, that the conditional limitations in question "have all the legal incidents and attributes of remainders:" and he quotes the case of *Cogan* v. *Cogan*, *Cro. Eliz.* 360, as a decided case, which establishes the point, that they are not valid as remainders, when created by deed, which case is also relied on, for the same purpose, by *Gilbert*, C. B.: as is mentioned by *Fearne*, and appears more fully from *Gilbert's Treatise on Remainders*, printed at large in the 7th vol. of the 8vo. (fifth) edition of *Bacon's Abridgment*, p. 800. *Fearne* (p. 14.) puts some cases of conditional limitations by will, where the estate to arise upon the contingency is not to accrue to the *person* entitled to the particular estate, but to him in remainder, which he maintains would be valid limitations, to operate as executory devises; but which, if the distinction maintained by him were discarded, would rank as remainders,

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Brown (a). There, an estate was given in fee, defeasible on the event of the devisee dying without *issue, living the devisee over. Here, a life estate is given, enlargeable on the event of the daughter's marrying and having issue. In *Pells* v. *Brown*, the limitation was held to be, not a remainder, but a conditional limitation, and good by way of executory devise. Here, in like manner, the second limitation to the daughter is not to be considered as a remainder; and, if it is not, the subsequent limitation must be an executory devise. As an executory devise, it is not too remote, for it is limited to vest, if at all, on the death of the daughter. 2. But, if the second limitation to the daughter should be thought to be a remainder, then it may be necessary to consider, whether the testator meant to give her any thing more than an estate-tail by that limitation, and, though the words are, "Unto my said "daughter and to her heirs and assigns for ever," yet subsequent words may restrain the estate to a fee-tail, as in the case of *Doe* v. *Reason* (b). Here, there are subsequent words which seem to indicate an intention only to give the daughter an estate-tail; and, if that construction should prevail, the last limitation over to the wife was a vested remainder, and, of course, not barred by the recovery; for it is only *contingent* on the supposition of the preceding contingent limitation being in fee; it being a rule, that all estates limited after a contingent fee, must be contingent, on account of the established maxim, that a fee cannot be mounted on a fee.

During *Graham*'s argument, BULLER, *Justice*, observed, that, if *Anne Chevall* had married and had issue, her life estate would not have merged, as contended by *Graham*, because it was not limited to take effect till the death of the wife.

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(a) *B. R. M.* 18 *Jac.* 1. *Cro. Jac.* 590.

(b) *B. R. T.* 28 & 29 *Geo.* 2. 3 *Wils.* 224, and stated *supra*, p. 267.

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mainders, and be, therefore, considered as barrable. And (p. 338.) in a detailed statement and discussion of the principal case, he shews, (in concurrence with the observation of *Buller*, J.) that the estates in fee here limited, would only vest in *interest*, and not in *possession*, during the continuance of the estates for life; and, therefore, could not be said to "abridge the particular estate." *Fearne* agrees to the statement, that limitations of this nature, when created by will, are reducible, in effect, to contingent remainders, or executory devises; and observes, that the point in judgment, in the principal case, does not militate against his definition; which is indisputably true, whatever may be thought of the controversy arising from the argument used by the counsel.

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Le Blanc, for the defendants, contended, that, whether the daughter took at first an estate-tail, or only an estate for life, the remainder over to the widow was barred by the recovery. If she took an estate-tail, the case was clear; but, if she only took an estate for life, then, he said, the limitation to the widow was upon a contingency with a double aspect; it was a concurrent remainder in fee, created in the alternative, with a contingent remainder in fee to the daughter; and, a recovery having been suffered by the tenant for life, every body was barred but the heir at law, which the daughter herself was in this case. He insisted, that it was impossible to distinguish this case from those of *Luddington* v. *Kime* (*a*), *Doe* v. *Holme* (*b*), and *Goodright* v. *Dunham* (*c*), that the second limitation to the daughter was capable of taking effect as a contingent remainder in fee, and, of course, that to the widow was so; and it was an established maxim, that, whenever an estate can take effect as a remainder, it shall not be construed to be an executory devise [2].—He also said, he meant to argue, that, if the limitation to the widow should be held to be an executory devise, yet it ought to be considered as limited on an indefinite failure of issue, and, therefore, too remote; but Lord MANSFIELD said, it was impossible to maintain that position, for that the words clearly confined the failure of issue to the time of the daughter's death.

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Lord MANSFIELD,—The rules and principles laid down by Mr. *Le Blanc* are indisputable. It is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or springing use. Here, the first limitation is to two persons and the survivor, so that a preceding freehold will be in the survivor, and the estate over is limited on a contingency upon which a remainder may depend. It is to the daughter and her heirs, (not issue,) if she should marry and have issue, and it must have taken effect after the death of the survivor. There is another contingency, on the event of the daughter dying unmarried and without issue, (not on failure of her issue,) and, upon that event, the limitation is to the widow in fee. But the tenant for life, by the recovery, has barred the contingent remainders.

The *Postea* to be delivered to the defendants.

(*a*) *C. B. E.* 9 *W.* 3. 1 Ld. *Raym.* 203. 1 *Salk.* 224. 3 *Lev.* 431, and stated *supra*, p. 265.

(*b*) *C. B. T.* 11 & *M.* 12 *Geo.* 3. *Wils.* 237. 241. 2 *Blackst.* 777, and stated *supra*, p. 265.

(*c*) *M.* 20 *Geo.* 3. *supra*, p. 264.

[2] In *Pells* v. *Brown*, the limitation over could not enure as a remainder, because it was limited on the defeasance of a defeasible *vested* fee.

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RIGHT, Lessee of MITCHELL and his Wife, *against* SIDEBOTHAM and Another.

Friday, 29th June.

By the following devise, *viz.* "I "give and *devise* to *A. her* "*heirs and assigns for ever*, "all my lands "at *B.* and I "give and be-"queath to *A.* "aforesaid all "my lands at "*C.*" *A.* only takes an estate for life in the lands at *C.* and the reversion thereof shall descend, although with these introducto[ry words] "For [those] "worldly goods "and estates "wherewith it "has pleased "God to bless "me," and contained a legacy of 1s. to the heir at law.

ON an ejectment, tried at the last *Spring* Assizes for the county of *Oxford*, before HEATH, *Justice*, a special verdict was found, which stated: That one *William Sparrowhawk*, being seised in fee-simple of the premises in question, on the 10th of *February*, 1758, made and duly executed his will, and, thereby, devised as follows:—" For " those worldly goods and estates wherewith it has pleased " Almighty God to bless me, I give and dispose in manner " following. *Imprimis*, I give and bequeath to my sister " *Susannah Mitchell, one shilling*. *Item*, I give and be- " queath to *John Mitchell*, son of *Susannah Mitchell, one* " *shilling*, to be paid by my executrix herein-after named, " within three months after my decease. *Item*, I give and " bequeath to my loving wife, *Susannah Sparrowhawk*, all " the rest of my goods and chattels, and personal estate " whatsoever. Also, I do give and *demise* unto *Susannah* " *Sparrowhawk*, my said wife, *her heirs and assigns for* " *ever*, all my lands lying in the parish of *Bampton in the* " *Bush*, in the county of *Oxford*, and now in the occupa- " tion of *Mary Sparrowhawk* of *Aston*, in the parish afore- " said. *And I give and bequeath to my loving wife afore-* " *said, all my lands, tenements, and houses, lying in the* " *parish of Chipping Norton*, (to wit) the house I now live " in, the Sign of the *Plough*, standing between the houses " of *W. W.* and *T. A.* and now in my occupation with the " yard, garden, and out-houses, and all other appurtenants " thereto belonging. *Lastly*, I do make and constitute " *Susannah Sparrowhawk*, my said wife, full and sole exe- " cutrix of this my last will and testament."—That the testator died seised in fee, on the 20th of *September*, 1766, leaving the said *Susannah Mitchell*, one of the lessors of the plaintiff, his only sister and *heir at law*; and that the testator's widow married the defendant *Sidebotham*, and died on the 1st of *November*, 1777.

The question upon this special verdict was, Whether the last-mentioned premises in the will, were, by the true construction thereof, devised to the widow *in fee*, or only for life?

Caldecott, for the plaintiff, insisted, that only a life estate in those premises was given by the will, and that the reversion expectant on the death of the widow, had descended to *Susannah Mitchell*, the testator's sister and heir at law. He said,

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said, it was clear, that, by the words of the devise, taken by themselves, nothing was given but an estate for life, and the court would hold themselves bound by the legal operation of the words, and not indulge uncertain conjectures about the intent of the testator. The circumstances from which an intent to give an estate in fee, might be attempted to be inferred, on the part of the defendants, were, first, the general introductory words [F 1] at the beginning of the will, *viz.* " For " those worldly goods and estates, *&c.*" and, secondly, the legacy of one shilling to the heir at law. The first, it might be said, indicated a determination to dispose of the complete interest in every thing the testator had in the world [☞], and the other a resolution to disinherit his heir. But, as to the introductory words, they are almost of course in wills, and are merely descriptive, and not meant to relate to the quantity of interest given in the things devised; and, as to the supposed disinheriting clause to the heir at law, it must be considered, that the interest of the heir at law, is, in no case, derived from the bounty of the testator, but from the disposition of law, and it is sufficient for his title, if the testator either does not give the whole to another person, or, designing perhaps to do so, executes his design with so much uncertainty, and so insufficiently, as that it cannot be taken notice of by a court of law. The cases he relied upon were, *Denn, Lessee of Gaskin*, v. *Gaskin, B. R. M.* 18 *Geo.* 3. [† 163], and *Roe, Lessee of Callow* & *others*, v. *Bolton, C. B. M.* 16 *Geo.* 3.—The first came on in the form of a special case, which stated, that *John Gaskin*, being seised in fee, by his will, after prefacing, " As to such worldly " estate as it hath pleased God to endue me with," devised as follows: " I give and bequeath all that my freehold mes- " suage and tenement lying in *G.* in the parish of *D.* to- " gether with all houses, farms, edifices, and appurtenants, " reputed as part thereof, or belonging to the same, to " *Matthew Robinson, George Robinson,* and *Thomas Ro-* " *binson,*

[☞] In *Maundy* v. *Maundy, B. T. R.* 8 *Geo.* 2. Lord *Hardwicke* laid great stress on similar words, *viz.* " In " respect to my worldly estate where- " with it hath pleased God to bless " me." *Ca. Temp.* Lord *Hardw.* 142, 143. 2 *Str.* 1020, 1021.

[† 163] Since reported, *Cowp.* 657.

[F 1] That such introductory words will not enlarge a subsequent general devise, from a life estate to a fee, *Vide Doe*, d. *Briscoe* v. *Clark*, 2 *N. R.* 343. See also the same point, *acc.* by seven Judges, *Mansfield*, Chief Justice, *contra*, *Doe*, d. *Wright* v. *Child*, 1 *N. R.* 335, and *Doe*, d. *Child* v. *Wright*, 8 *T. R.* 64. Also *Doe*, d. *Small* v. *Allen*, *ibid.* 497, *Goodright* v. *Stocker*, 5 *T. R.* 13, and *Doe*, d. *Spearing* v. *Buckner*, 6 *T. R.* 610.

"*binson*, equally to them my sister's sons;" That the will then proceeded to give several pecuniary legacies, of different amounts, to different relations, and, among others, ten shillings to the lessor of the plaintiff; That the testator died seised in fee, and, afterwards, *Matthew* and *George Robinson* died; That *Thomas Robinson* was alive, and that the lessor of the plaintiff was the testator's heir at law. The main question was, whether the three nephews took an estate in fee, or only for life; and it was argued, for the defendant, that they took an estate in fee, as must be collected from the prefatory words, and the legacy to the heir at law; but Lord MANSFIELD said, though he suspected the testator's intent was to give the whole interest, as he did not appear to have had any *other lands* [1], and had given a disinheriting legacy to his heir at law, the court could not connect the prefatory with the devising clause; and, in the devising clause, there were not any words by which the court would be warranted in construing it to be an entire disposition of the estate. WILLES, *Justice*, was absent; but ASTON, and ASHHURST, *Justices*, concurred, and ASTON mentioned a case of *Right, Lessee of Shaw* & *another*, v. *Russell*, in the court of *Exchequer*, *H.* 1 *Geo.* 3. where introductory words, like those in the present case, were held to be mere matter of form, and not material; and the day after he brought his note of that case into court, and read it, and it appeared, that the will there began, "As touching the disposition of such temporal estate as it has pleased God to "bestow on me," and then the testator proceeded to give his house to his son *Samuel Russell*, and after his death, then to the two sons of *Samuel*, *Thomas*, and *William*, and then, at last, gave a legacy of *one shilling* to the husband of his heir at law; and the determination was, that *Thomas* and *William* only took for life, and that the reversion descended; and ASTON, *Justice*, observed, that that was a stronger case than *Denn* v. *Gaskin*, because, if *Samuel* had survived his two sons, they would have taken nothing by the will. In *Roe, Lessee of Callow* & *others*, v. *Bolton*, there were these introductory words in the will: "As touching such "worldly estate wherewith it hath pleased Almighty God to "bless me with." The testator then gave all his real and personal estate to his wife for life, and then came this devise; "*Item*, I give unto my son *Paul Cardale*, all that my land "lying and being in the parish of *Dudley*, in the county of "*Worcester*, near unto a certain place called *Tinsly Hill*, "into three parts divided, at or immediately after my wife's "decease." Then came several legacies of personal and leasehold property to his son *Isaac Cardale*, and his daugh-ter

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[1] And therefore it was not necessary to distinguish those devised, by local description.

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ter *Elizabeth Mason*, after his wife's death, and then followed this clause; "*Item*, my will is, that all my grandchildren that are living twelve months after my wife's decease shall have five shillings each of them as a token of the love that I bear *unto my generation* [1]." The lessors of the plaintiff were the testator's heirs at law, being his grand-daughters by his eldest son *William Cardale*, and the question being, whether *Paul Cardale* took an estate for life or in fee, the court held, that he only took an estate for life; yet in that case, likewise, there was the same sort of introductory clause as here, and also a disinheriting legacy. After stating the two foregoing cases, *Caldecott* observed, that it appeared, that the testator knew the technical words necessary to create a fee, having used them in the first branch of the devise, and, therefore, he must be considered as having designedly omitted them in the other; nay, that the very circumstance of making two branches of the devise, showed a design to give different interests, since, if he had meant to give the same estate in all the premises, one set of words would have answered the purpose.—He also cited the cases of *Swayne* v. *Fawkner* & *another, Executors of Middleton* (*a*), and *Beviston* v. *Hussey* (*b*).

Bower, for the defendants, contended, that the intention was clearly to give the whole interest. The testator not only begins by expressing the purpose of disposing of all his property, but uses the double precaution of giving legacies both to his heir at law and her son. In the case of *Cole* v. *Rawlinson* (*c*), words sufficient to carry a fee-simple in the first part of a devise, were connected with a subsequent part, so as to make that an estate in fee, which would otherwise only have been for life, by the opinion of POWELL, POWYS, and GOULD, *Justices*, against Lord HOLT. The words were, "I give, ratify, and confirm all my estate, "right, title, and interest which I now have, and all the "term and terms of years which I now have, or may have "in my power to dispose of after my death, in whatever I "hold by lease from *Sir John Freeman*, and *also the house* "*called the Bell Tavern*, to *John Billingsly*." The copulative word "*and*," in that case, was held sufficient to carry the

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[1] This state of the will in the case of *Roe* v. *Bolton*, was taken by Mr. *Caldecott*, (who favoured me with it,) from an office copy furnished him by his client. If that copy was correct, there is a singular omission of the word "*my*" in the account of the case in 2 *Blackst.* 1045, where the court are mentioned to have taken notice of the testator's having assigned a whimsical reason, *viz.* "*his love to* "*generation*," for giving the legacies to his grand-children.

(*a*) *Dom. Proc. Show. Parl. Ca.* 207. *Skinn.* 339.

(*b*) *B. R. M.* 6 *W.* & *M. Skinn.* 385. 562.

(*c*) *B. R. H.* 1 *Ann.* 1 *Salk.* 234. 2 *Ld. Raym.* 831.

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the preceding words, "*all my estate, right, title, and in-* "*terest,*" over to that part of the devise which respected the house called the *Bell Tavern*. In this present case there are, in like manner, words expressive of a fee-simple interest in the first branch of the devise, and that branch is connected with the other by the same copulative "*and.*" That material circumstance was wanting in the case of *Denn* v. *Gaskin*. In short, if the interposing words in the second branch of the devise in question, between the copulative and the description of the premises thereby devised, *viz.* "I give and "bequeath, &c." were wanting, there could be no doubt. It would then be an express devise in fee; and the unnecessary use of those words cannot have the effect of defeating the clear intent of the testator. As to *Roe* v. *Bolton*, the reasoning of the court, as stated by Mr. *Justice* BLACKSTONE, is rather in favour of the present defendants, for they clearly thought, that a legacy to an heir at law indicating an unequivocal intent to disinherit him, would be sufficient to give to words like those in the present case, the effect of carrying a fee-simple. No serious argument can be drawn from any supposed knowledge this testator had of the technical operation of words, since, in the first branch of the clause in question, he uses the expression "*demise,*" instead of "*devise.*"

Lord MANSFIELD,—I verily believe, that, in almost every case whereby law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property [F 2]. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. "All "my estate" or "all my interest" will do: But "all my "lands lying in such a place" is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else [☞]. I have no doubt but the testator's intention here was to disinherit his heir at law, as well as in the case of *Denn* v. *Gaskin*; but the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it, (which I do not believe he had,) rather turns the other way, because he

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[☞] *S. P. Ca. Temp. Lord Hardw.* 143.

[F 2] See the same doctrine by *Mansfield*, Chief Justice, 2 *N. R.* 349, in his judgment in *Doe* v. *Clarke*, *supra cit.* Also in his judgment in *Doe* v. *Child*, 1 *N. R.* 346.

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he uses different words in devising two different parts of his estate. I think we are bound by the case of *Denn* v. *Gaskin*, and the other cited in that case by Mr. *Justice* ASTON.

WILLES, *Justice*,—In *Cole* v. *Rawlinson*, (which, however, was decided against the opinion of Lord HOLT,) the whole devise was in one sentence: It was all one devise.

BULLER, *Justice*,—It is impossible for us to make this only one devise, when the testator has made it two.

Judgment for the plaintiff [† 164].

[† 164] *Vide Ibbetson* v. *Beckwith*, *Canc. M.* 1735. *Ca. Temp. Talb.* 157. *Roe* v. *Blackett*, *B. R. H.* 15 *Geo.* 3. *Cowp.* 235. *Hogan* v. *Jackson*, *B. R. T.* 19 *Geo.* 3. *Cowp.* 299. 306. *Loveacres* v. *Blight*, *B. R. M.* 16 *Geo.* 3. *Cowp.* 352. *Frogmorton* v. *Wright*, *C. B. E.* 13 *Geo.* 3. 2 *Blackst.* 889. *Stiles* v. *Walford*, *C. B. H.* 14 *Geo.* 3. 2 *Blackst.* 938. *Goodright* v. *Allin*, *C. B. M.* 16 *Geo.* 3. 2 *Blackst.* 1041. ☞ *Macaree* v. *Tall*, *Canc.* 1753. *Ambl.* 181. *Tuffnell* v. *Page*, *Canc.* 1740. 2 *Atk.* 37. *Rogers*, *lessee* of *Dawson*, v. *Briggs*, *B. R. E.* 11 *Geo.* 2. *Andr.* 210. *Holdfast* v. *Martin*, *B. R. M.* 27 *Geo.* 3. 1 *Term Rep.* 411. *Fletcher* v. *Smiton*, *B. R. M.* 29 *Geo.* 3. 2 *Term Rep.* 656.

Friday, 29th June.

CHANCELLOR *against* POOLE.

The assignee of a term, *declared against as such*, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed, thereby, that the term, which was determinable at his option, should be absolute.

ACTION of covenant for rent in arrear.

The *declaration* stated, a demise, by indenture, under seal, from the plaintiff, to one *Burrough*, his executors, administrators, and assigns, for twenty-one years, containing the usual covenant, by *Burrough*, for himself, his executors, administrators, and assigns, for payment of the rent, and, also, a mutual covenant, that the lease should be determinable at the end of the first seven, or first eleven years, at the option of either party, giving six months notice to the other. The declaration then stated, that, afterwards, by deed-poll, between *Burrough*, the *plaintiff*, and the defendant, he, the said *Burrough*, by and with *the consent of the plaintiff*, testified by his executing the said deed-poll, bargained, sold, *assigned*, and set over to the defendant, his executors, administrators, and assigns, as well the aforesaid indenture of lease, and the message, &c. thereby demised, as all the estate, right, title, interest, &c. of him the said *Burrough* therein, to hold to the said defendant, his executors, administrators, and assigns, for all the unexpired residue of the twenty-one years, in as large and ample a manner, and form, to all intents and purposes, as he the said *Burrough*, his executors or administrators, might, could, or of right ought to have held or en-[765]joyed the same, had the said deed-poll never been made, he the said defendant, his executors, administrators, or assigns, *paying the rent*, and performing the covenants, in the said indenture

indenture of lease mentioned, and *indemnifying* him the said *Burrough*, his executors, and administrators, against the same; that it was, by the said deed-poll, agreed between *the plaintiff*, the defendant, and *Burrough*, that the said term of twenty-one years should be and continue *an absolute lease* to the end of that term, and, therefore, *they did release each other* from the covenant in the lease contained, for the sooner determining the same; that the defendant, afterwards, by virtue of the said deed-poll, entered and became possessed, *&c.*; that the plaintiff had always, since the making the said last-mentioned deed, performed every thing in the said indenture of lease, and in the said deed-poll, contained, on his part to be performed. Then an *assignment* of a breach of covenant, by the defendant, by the non-payment of half a year's rent, which became due at *Christmas*, 1780.

Plea, that, before the rent so in arrear, or any part of it, became due and payable, *viz.* on the 3d of *September*, 1779, the defendant assigned the demised premises, and all his estate and interest therein, to one *Bucholl*, his executors, administrators, and assigns, to hold, from the 29th of *September*, 1779, for the remainder of the said term, by virtue of which said assignment, *Bucholl*, afterwards, and before any part of the rent aforesaid became due and payable, *viz.* on the said 29th day of *September*, 1779, entered and became possessed, *&c.*

General demurrer.

The question, on this record, was, whether, upon the state of the case as set forth in the declaration, the defendant was to be considered as having become an immediate lessee under the plaintiff, by the operation of the deed-poll, or, at least, as having thereby covenanted personally with the plaintiff, for the payment of the rent; or whether he was only an assignee, with a mere derivative title from *Burrough* the first lessee. If the defendant was a lessee, or had covenanted personally with the plaintiff, he was liable for breaches of covenant happening after the assignment of his interest; because, though the privity of *estate* was gone, the privity of *contract* still remained between him and the lessor: If he was only an assignee, there never was any privity of contract between them, and, therefore, he ceased to be liable, as soon as his assignment to *Bucholl* put an end to their privity of estate.

Wood, for the plaintiff, contended, that, from the circumstances of the plaintiff's being a party to the deed-poll, and his *agreeing*, that the term should continue *absolute* for the residue of the twenty-one years, the court ought to consider this case as very different from that of a common assignment. The deed-poll was, in truth, a new grant from the plaintiff; at least the clause in it, by which it is declared, that the de-

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fendant shall hold the premises in as ample a manner as *Burrough*, " he the defendant *paying the rent*," ought to be construed to be a covenant from the defendant, personally to the plaintiff, for the rent. And there is a good consideration, on the face of the deed-poll, for such a covenant, namely, the enlargement of the interest in the term, by making it absolute instead of defeasible. Now, though an assignee, merely as such, is not liable to the covenants longer than while he keeps the estate, yet he may make himself liable by a new covenant with the lessor, inserted for that purpose in the deed of assignment. No particular set of words is necessary to make a covenant. Any form of expression amounting to an agreement, if under seal, is sufficient. This has been repeatedly determined; *Hill* v. *Carr (a)*, *Brice* v. *Carre, (b)*, *Hollis* v. *Carr (c)* [1].

Mingay, for the defendant, insisted, that this was a mere assignment. The clause relied upon on the part of the plaintiff, if it amounts to a covenant, is only a covenant with *Burrough*. Who is stated on the record as the *party granting* to the defendant? Not the plaintiff, but, *Burrough*.— " *He the said Burrough bargained, sold, assigned, &c.*"— If there had been any intention of a covenant between the plaintiff and the defendant, there could have been no occasion for stipulating that the defendant should indemnify *Burrough* against the payment of rent.—*Mingay* then stated that there was, in the original lease, a clause restraining the lessee from assigning without the consent of the plaintiff, though it had not been mentioned on the record; that it was on account of that clause, that it had not been thought proper to make the plaintiff a party to the deed-poll; and, if the court should think *that* a material part of the case, he would move for leave to amend the plea, by inserting it.

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Lord MANSFIELD,—I think *that* would make no difference. The question is, whether the plaintiff is a contracting, or merely an assenting, party, in the deed-poll.

ASHHURST, *Justice*,—The plaintiff seems to me to have decided against himself, for he has stated this as an assignment. If he had meant to avail himself of it, as a contract between the defendant and himself, he should have stated it according to the legal operation [2], and as a demise from the plaintiff to the defendant.

BULLER, *Justice*,—It strikes me, that, if the plaintiff had considered the deed-poll as a new lease, and the defendant as his immediate lessee, he had no occasion to state the first

(a) *Canc. M.* 28 *Car.* 2. 1 *Ca. in Chanc.* 294.

(b) *B. R. M.* 13 *Car.* 2. 1 *Lev.* 47.

(c) *Canc. E.* 28 *Car.* 2. 2 *Mod.* 86.

[1] This is the same case with *Hill* v. *Carr*, only in an earlier stage. The name of the plaintiff is mistaken in *Cases in Chancery*.

[2] *Supra*, p. 667.

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first lease in his declaration. He seems to have concluded himself.

Lord MANSFIELD,—There is a covenant by the defendant for paying the rent in the deed-poll: but it is with the lessee.

Judgment for the defendant.

The KING *against* the INHABITANTS of WIVELINGHAM.

Saturday, 30th June.

An estate being devised to trustees to be sold to pay debts, and to divide the surplus, if any, between *A. B.* and *C.*, *A* has an equitable interest in the estate, and by residing upon it forty days, gains a settlement.—A devise is not a purchase within 9 *Geo.* 1. c. 7.

BY an order of two justices, *Mary Bittany*, widow, and *Mary* her daughter, were removed from the parish of *Haddenham* in the isle of *Ely*, to the parish of *Wivelingham* in the county of *Cambridge*; and, upon an appeal, the court of Quarter Sessions confirmed the order, stating the following case:

Robert Bittany, the late husband of *Mary Bittany*, one of the paupers, came, with the said *Mary*, and *Mary* their daughter, from the parish of *Wivelingham*, to the hamlet of *Aldreth* in the parish of *Haddenham*, with a certificate from the parish of *Wivelingham*, dated the 12th of *December*, 1750, which acknowledged him and *Mary* his wife, and also *James* and *William* their children, to be inhabitants legally settled in *Wivelingham*. *Robert Bittany* continued at *Aldreth* between five and six years, when he returned to *Wivelingham*, where he remained between twelve and thirteen years. He then went and resided at *Aldreth* upon an estate he acquired in the following manner.——On *Elizabeth Bittany* being seised in fee of a copyhold messuage or tenement in *Aldreth* holden of the manor of *Haddenham*, duly surrendered the same to the use of her will, and, being also seised of a freehold dove-house and piece of land in *Aldreth*, by her last will, bearing date the 13th of *April*, 1768, devised in the words following;—" I give and devise all that my " copyhold messuage or tenement wherein I now dwell, with " the appurtenants thereto belonging, also my freehold dove-" house, and the piece of land which the same now stands " on, unto *T. S.* and *R. W.* and to their heirs, in trust, to " be sold as soon as conveniently can be after my decease, " for the best price or sum that can be got for the same, and " the money arising from the sale thereof, (over and above " the charge and expences of selling the same,) to be equally " divided between *Robert Bittany* and the three daughters of " *William Bittany* deceased, share and share alike."—*William Bittany*, in the will mentioned, was the elder brother, and *Robert Bittany* a younger brother, and they were the nephews of the testatrix. Upon her death, which hap-

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 pened

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pened about twelve years ago, *Robert Bittany* took possession of the copyhold message. By indentures of lease and release, of the 24th and 25th of *May*, 1768, the release being made between *T. S.* and *R. W.* the two devisees, of the first part, *Jane Bittany*, spinster, *John Aungier*, and *Mary* his wife, late *Mary Bittany*, spinster, and *Elizabeth Bittany*, spinster, of the second part, and *Robert Bittany* of the third part—Reciting the will of *Elizabeth Bittany*, and that the said *Jane Bittany*, *John Aungier*, and *Mary* his wife, *Elizabeth Bittany*, spinster, and *Robert Bittany*, had agreed, with the consent and approbation of *T. S.* and *R. W.* that the said *Jane Bittany*, *John Aungier*, and *Mary* his wife, and *Elizabeth Bittany*, should take, (and accordingly they did take,) the ready money of the said *Elizabeth Bittany*, the testatrix, amounting to £60 (after all her just debts and funeral expences were satisfied,) for their shares, and that *Robert Bittany* should take the said dove-house and piece of ground for his share.—It was witnessed, that, in consideration of the said agreement, *T. S.* and *R. W.* did, thereby, grant, bargain, sell, and convey, unto the said *Robert Bittany*, *the said freehold piece of ground, with the dove-house thereon erected*, to hold to him, his heirs and assigns for ever. In the said release, there was a covenant from *T. S.* and *R. W.* for quiet enjoyment, and to make further assurances, and a covenant from *Jane Bittany*, *John Aungier*, and *Mary* his wife, and *Elizabeth Bittany*, to *Robert Bittany*, his heirs and assigns, that, for the further performance of the said agreement, and for quieting him in the possession, not only of the said freehold piece of ground, dove-house and premises, but also of the copyhold message and premises with the appurtenants, and for extinguishing any claim they, or any of them, might challenge or demand, of, in, or to, the same, as heiresses at law of the said *Elizabeth Bittany*, or otherwise howsoever, they did thereby remise, release, and for ever quit claim, unto the said *Robert Bittany*, all manner of right, title, trust, property, claim, and demand whatsoever, of, in, to, or out of, the said freehold premises, and also of, in, to, or out of, all and singular the said copyhold premises; and, thereby, severally promised to do any further act or deed, for continuing the said copyhold message and premises to the said *Robert Bittany*. No farther conveyance of the copyhold premises was made by the other parties in the said indentures named, to *Robert Bittany*; but, at a court holden for the manor of *Haddenham*, on the 17th of *April*, 1770, *Robert Bittany* was admitted in fee to the said message or tenement, with the appurtenants, as cousin and heir at law [1] of *Elizabeth*

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[1] He was cousin, but not heir at law, the grand-nieces being the children of an elder brother.

Elizabeth Bittany. He resided in the said messuage, and continued in the uninterrupted possession and quiet enjoyment of the said freehold and copyhold estates, to the time of his death, being about eleven or twelve years, and was, during that time, assessed, and paid to the land-tax: but the said premises were not, at any time, of the value of £30 and they are, at this time, agreed to be sold for £15.

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Howorth shewed cause against quashing the orders. The question, he said, was, whether the residence of *Robert Bittany*, the pauper's husband, at *Aldreth*, was such a residence upon his own property, as would discharge the certificate, and gain a settlement. He admitted, that the residence on an estate in which a man has only an equitable interest is sufficient; but he contended, that *Robert Bittany* had taken no interest of any sort in the lands, by the will, neither legal nor equitable. He had only a right to call upon the trustees to sell the estate, and distribute the money arising from the sale. As to what interest he took by the conveyance from the trustees and the other legatees, that was a *purchase* within the meaning of the statute of 9 *Geo.* 1. *c.* 7. and, the whole being under the value of £30, he could not, thereby, have discharged the certificate, or have gained a settlement.

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A. Pemberton, on the other side, contended, that *Robert Bittany* had clearly an equitable title under the will; that all the *cestui que trusts* had agreed that the trustees should not sell; and that it is clearly settled, that a residence on one's own estate, coming either by descent or devise, whether the legal interest is coupled with the equitable or not [F], and whatever the value is, will gain a settlement, and discharge a certificate [1]. If the certificate was discharged in this case, *that* was sufficient, for then a settlement was gained by the assessment and payment of the land-tax.

Lord MANSFIELD mentioned the case of *Roper* v. *Radclyffe* (*a*), to shew, that a devisee of the surplus arising from the sale of lands after payment of debts and legacies, has

[1] *Vide Rex* v. *Marwood*, *H.* 29 *Geo.* 2. *Burr. Settl. Ca.* No. 124, and *Rex* v. *Ingleton*, *E.* 6 *Geo.* 3. *Ib.* No. 179.

(*a*) *Dom. Proc.* 1713. 9 *Mod.* 167. 181. *Bac. Abr. Tit. Papists*, vol. 3. p. 795.

[F] S. P. *R.* v. *Lopen*, *T. R.* 577, where the equitable title arose under a bond conditioned to convey the premises. So in *R.* v. *Edington*, 1 *East.* 288, where the legal estate had been conveyed, in trust for payment of money, and, after, to reconvey; and nothing had been done under the deed; the court held the conveyance, in substance, a mortgage, and the *cestui que* trust entitled to a settlement by residence.

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has an equitable interest in the lands themselves, it being in his option, to pay the debts and legacies, and keep the land.

Willes, *Justice*, said, the same question, as in this case, had occurred in *Rex* v. *Natland (b)*, which was referred to Gould, *Justice*, when upon the circuit, who decided, that a settlement was gained; and that his opinion had been, afterwards, recognized by the court.

Both the orders quashed [†165].

(b) M. 15 *Geo.* 3. *Burr. Settl. Ca.* No. 247.

[† 165] In *Rex* v. *North Curry, M.* 22 *Geo.* 3. the court determined, that a person *solely* entitled to administration, but in whom the whole would not have vested for his own use, having resided forty days on a leasehold tenement of the intestate, for a term of years determinable on lives, did not thereby gain a settlement.

[771] Saturday, 30th June.

Goodright, Lessee of Alston, *against* Wells and Others.

If the legal interest in land descend in fee-simple *ex parte maternâ*, and the equitable interest in fee-simple *ex parte paternâ*, or *vice versâ*, the equitable estate shall merge in the legal, and both follow the line through which the legal estate descended.

THIS ejectment was tried before Lord Mansfield, in *Middlesex*, at the Sittings after last *Easter Term*, and a verdict found for the plaintiff, subject to the opinion of the court, on a case, which, as far as is material to be stated, was as follows:

James Selby, Serjeant at law, agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made of it to him, having by his will [made subsequent to the agreement,] devised—"All the rest of my "real and personal estate whatsoever, and wheresoever, to "my said wife in trust, that she do thereout educate and "maintain my said son, until he shall attain the age of "twenty-one years, and until he shall have sufficiently settled and secured to, and upon, my said wife, what is to be "settled upon, and given to, her as aforesaid, and, afterwards, in trust, to convey and dispose of all the then rest "of my real and personal estate, and the produce thereof, "to my said son, his heirs, executors, and assigns; but, in "case my said son shall die without issue, before he shall "attain his said age of twenty-one years, then in trust, &c."—After the testator's death, a conveyance by lease and release, of the estate in question, was made to Mrs. *Selby* the widow, who died before the son attained his age of twenty-one years, which he afterwards did attain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the statute of mortmain *(a)*. The lessor of

(a) 9 *Geo.* 2. *c.* 36.

of the plaintiff was his heir at law *on the part of the mother*, and the defendants his heirs at law *on the part of the father's mother*.

The case was argued on *Friday*, the 29th of *June*, by *Wilson*, for the plaintiff, and *Batt*, for the defendants.

Wilson,—The question depends on the manner in which the son took; whether by descent from the father, or from the mother. He cannot have taken the *legal* estate by descent from the father, because *he* was never seised. Suppose the father had devised the equitable estate to a stranger, and the legal conveyance had, afterwards, been made, (as now,) to the widow in fee, and she had died, the *cestui que trust* must have called on the heirs of the mother, not those of the father, for a conveyance of the legal estate. Then, if the equitable estate descended from the father to the son, (which, however, I do not admit, because of the devise to the mother,) both the legal and equitable interest met in him; and, after his death, the legal estate certainly descended on the lessor of the plaintiff, as his heir *ex parte maternâ*. But, it will be said, that he is only a trustee for the heirs *ex parte paternâ*; that the two estates separated on the death of the son, and took different courses, the beneficial interest descending in the paternal line. I believe such a doctrine is not countenanced by any authority. There is no case where the legal estate and equitable interest, after they have both vested in fee-simple in the same person, have been held to separate again, unless such person has done some positive act to sever them. Mr. *Selby*, the son, did no act which could have that effect. If there were a doubt on this subject, and it could be supposed that the lessor of the plaintiff ought to be considered as a trustee, the question is proper for another judicature. But how can any trust be raised in this case? There is no conscience to turn the scale; no intention, on the part, either of Serjeant *Selby*, or his son, in favour of one set of heirs, in preference to another. The *father* only meant to give the whole interest in the estate to the son, and did not think about the course of descent from him; and the *son*'s intention was, that neither set of heirs should have it, but a charity. The only question then is, (supposing the equitable estate to have come by descent from the father to the son,) whether equity shall follow the law, or draw the law after it. When the court of *Chancery* had a jurisdiction over uses, the *Chancellor* used to enquire how the legal estate would go in a court of law, and directed the use to go in the same course. Here the legal estate goes *ex parte maternâ*; and, therefore, the equitable interest shall do so likewise. But, did the equitable estate descend from the father to the son? If the will had stopped short at the devise to the mother, there would have been no doubt that it did not. As

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it now stands, the whole was devised to her in words, and it was necessary that she should have the fee-simple, to enable her to perform the trusts. If the son had lived till twenty-one, and the mother, on his making the settlement upon her required by the will, had conveyed to him, he would have taken both the legal and equitable interest, *by purchase* from her, and, as he did not, and no such conveyance was made, he took both from her *by descent*. I have found no decision on this subject in the books, but I have been informed of a case, *viz. Doe*, lessee of *Balch* v. *Putt & others*, which was determined in the court of *Common Pleas*, in *Trinity Term*, 8 *Geo.* 3. the circumstances of which were these:—It was an ejectment tried before HEWITT, *Justice*, at the assizes for *Somersetshire*, and a special verdict found, which stated, that *Mary Mortimer*, being seised in fee of an estate of which the premises in question were an undivided moiety, on her marriage, conveyed to trustees and their heirs, to the use of them and their heirs, upon trust, to permit her to receive the rents and profits to her separate use during life, and to grant and convey the estate, or any part thereof, to the use of such person or persons in fee, or otherwise, as she, whether married, or sole, by deed, or will, should appoint, and, for want of such appointment, to the use of the husband for life, remainder to her first and other sons in tail, remainder to her daughters in tail, as tenants in common, remainder to her right heirs; that the marriage took effect, and she died, leaving her husband and an only daughter, an infant; that the husband afterwards died, and then the daughter died, being still under age, and without issue; that the lessor of the plaintiff and one *Newton*, were the heirs at law of the daughter *ex parte maternâ*,) being the sons of two deceased sisters of the mother,) and that, on the daughter's death they entered on the estate; that the lessor of the plaintiff, and the surviving trustee by lease and release,—reciting as above, and that *Newton* had, for a certain sum, agreed to purchase the lessor of the plaintiff's moiety,—had, in consideration of the stipulated price, conveyed that moiety to *Newton* in fee; that, on the same day, by lease and release, also reciting as above, the trustee had conveyed the other moiety in fee to *Newton*; that *Newton* died seised of all the estate, leaving the lessor of the plaintiff his heir at law *ex parte maternâ*, and the defendants his heirs at law *ex parte paternâ*. The question on the special verdict was, Whether the moiety conveyed by the surviving trustee alone to *Newton*, (for which moiety only the action was brought,) belonged to the lessor of the plaintiff, or to the defendants [1]? The court unanimously decided

[1] I have compared the above state of the facts in this case with an office copy of the record of the special verdict. *Balch* had first gone into *Chancery*.

decided in favour of the latter, though it was contended, that the legal estate should follow the old use, which had come to *Newton* by descent *ex parte materná*. This case seems to be directly in point, for *Newton* took nothing by purchase from the trustee but the mere legal estate; yet it was determined, that the whole should descend from him in the paternal line, as in other cases of purchase.

Batt,--Surely it cannot be doubted but the equitable estate *descended* from the father to the son, notwithstanding the interposition of the estate devised to the wife, because, on the mother's death and his coming of age, being both devisee and heir at law, he was in of his better title. The intent of the creator of the trust was, that the son should take an estate to himself and his general heirs; *that* was a trust proper to be carried into execution; and, although courts of law have no direct jurisdiction for the execution of trusts, they take notice of them to a certain degree, and will not suffer mere trustees to defeat their *cestui que trusts*, or recover against them in ejectment. Uses and trusts were originally the same. Both rested on a confidence in the terre-tenant, and it is supposed, by many respectable authorities, that it is only from the great liberality which has prevailed in the courts of equity, for the last century, that any distinction has been made between them.—(Lord MANSFIELD,—"It was not the liberality of the courts of equity, "it was the absurd narrowness of the courts of law, resting "on literal distinctions, which in a manner repealed the "statute of uses (*a*) and drove *cestui que trusts* into "equity.")—Before the statute of uses, the use was considered, in most respects, as the complete ownership of the land. The estate of the feoffee was subservient to that of the *cestui que use*, and the former could do nothing to defeat the interest of the latter, unless by alienation for a valuable consideration without notice. The statute completed the subserviency, by consolidating the legal estate with the use. By analogy to uses thus considered, trust estates have been held to be the solid and substantial ownership of the land, and trustees the mere instruments of conveyance. To apply this doctrine: A trust was, here, created by Serjeant *Selby*, the owner of the estate, in his widow, for the benefit of his son, which he did not live to execute. If she had lived, the son, or his heir *ex parte paterná*, if he himself had died first, might have compelled her, or her heir, (the present lessor of

cery, and the facts were stated in his bill, and admitted by the defendants in their answer; but the *Master of the Rolls* would not decide the question, but made an order retaining the bill for a twelvemonth, with liberty to the plaintiff "to assert his right by "an ejectment," in consequence of which the action was brought. *Vide supra*, p. 344, *Note* *.

(*a*) 27 *Hen.* 8. *c.* 10.

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of the plaintiff,) to execute it, and, before it had been executed neither she, nor her heir, could not have set up the legal estate in an ejectment. If she had conveyed to the son, the whole interest would, then, undoubtedly have descended to the paternal heirs; and shall the omission and non-feasance by her, as a trustee, of an act, which, had she lived, it was her duty to perform, work so very material an injury to them? *Lex nemini facit injuriam.* Why should a descent from a trustee produce an injury, by operation of law, which the trustee could not have produced by a conveyance in her life-time? This is contrary to the nature of descents, and the principle of *remitters* already alluded to, by which, if a party has two titles, the law considers him as taking by the best. It is said, there was no trust, after the two estates united in the son; and that they cannot afterwards separate, and descend in different lines, unless some act is done to sever them. But no case has been cited to prove that position; the paternal heirs are the more worthy in the eye of the law; the father meant the estate to go to them, as being the general heirs; therefore the lessor of the plaintiff ought to be considered as taking subject to a trust for them. I have not been able to find any account of the reasons of the court of *Common Pleas,* in giving judgment in the case of *Doe* v. *Putt,* and it is not easy to conjecture upon what ground they went. According to a note which I have seen of the arguments of *Davy* and *Glynn,* Serjeants, the reasoning of the former on behalf of the defendants was very far from being satisfactory[2.] Indeed the case seems to me not to be distinguishable from the

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[2] I have seen the note to which *Batt* referred, and it appears, by it, that *Davy,* Serjeant, contended, that the conveyance of the legal estate by lease and release from the trustee, coupled with the original conveyance to the trustees, operated in the same manner as a feoffment by a tenant *ex parte maternâ* to the use of his maternal heirs, and a re-infeoffment of him by the feoffee, which, even though expressed to be to the use of *those heirs,* shall, of necessity, enure to those *ex parte paternâ.* He also insisted, that there was a manifest intention in *Newton* to alter the course of descent of his own moiety; the one, purchased by him from *Balch,* clearly descended in the paternal line; he could not mean that *Balch* should inherit the other, but must have designed that both should go in the same course; nor could any other motive be assigned for his taking the conveyance from the trustee. At any rate, he said, the lessor of the plaintiff had no legal interest, and, therefore, he must enforce his right, if he had any, in, equity.—(This last argument sounds a little oddly in a case which, though there were no controverted facts, had been sent out of a court of equity to be decided at law.)—*Glynn,* Serjeant, on the contrary, contended, that the conveyance by the trustee enured to the old use, and operated as a feoffment by a tenant *ex parte maternâ,* which would enure to the use of the maternal heirs without any declaration to that purpose. He admitted the law, as to a re-infeoffment, to be as stated by *Davy,* but said that case was peculiar.—

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the common one of a legal estate called in to complete a title. When a mortgage is satisfied, but no reconveyance takes place till after the death of the mortgagor, and then his heir calls in his legal estate, can it be said that the conveyance to him alters the course of descent? Upon the whole, there being, in this case, a lawful trust created for the paternal heirs, by one who had a complete dominion over the estate, the trustee is bound not to defeat it, and the court will not permit him to avail himself of his legal title against it, or to turn the *cestui que trust* round for relief to a court of equity.

Wilson, in reply,—It is true, I have not cited any authority to prove, that, when the legal and equitable estates unite, some act must be done to sever them; but it follows from the nature of the thing. The terre-tenant has the estate in confidence that he will suffer the *cestui que use* to enjoy the profits; but, if he is *cestui que use* himself, such confidence ceases, and the use, or trust, merges. There will be no injury done in this case. An injury is where a person is deprived of a right; and, here, the paternal heir had no right; neither complete nor inchoate: Neither *jus in re*, nor *ad rem*. I admit, that, if a conveyance had been compelled, the estate would have gone to the paternal heirs, because, then, the son would have been a purchaser, in which case, by a known rule of law, the descent is always in the paternal line.—(WILLES, *Justice*,—"I should wish to have it argued, whether "the lessor of the plaintiff did not take the legal estate "charged with the trust, which was for the paternal heirs, "they being understood by the word '*heirs*.' Is there any "case to shew that the trust is extinguished? It seems to "me, that it would be very unjust.")—I own I c[illegible] see no injustice, because it appears that Mr. *Selby*, the son, did not mean that either class of heirs should have the est[illegible]. While an ancestor, tenant in fee-simple, lives, the heir has no interest. The word "*heirs*" in a conveyance, only means to describe the extent of the interest, and to carry the complete ownership. Now, if *cestui que trust* of all has also the legal estate, there is nothing left to be the subject of a trust.

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The court took till this day to consider, when they delivered their opinions, to the following effect.

Lord MANSFIELD, (after stating the case,)—Serjeant *Selby*, after his purchase, was owner of the equitable estate, and had a right to go into *Chancery* to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance, on the condition of the son's living till twenty-one,

peculiar.—The authorities cited on both sides were, *Bacon on Uses*, 1 *Inst.* 13, *a.* *Martin* v. *Tregonwell*, 2 *Str.* 1179. and 1 *Wils.* 2. 66. 2 *Lill. Reg.* 11. *Nelson's Abr.* title *Descent*, 11. *Edwards* v. *The Countess of Warwick*, 2 *P. Will.* 171. *Chudleigh's Case*, 1 *Co.* 120, *Price* v. *Langford*, 1 *Show.* 92. *Salk.* 337. and *Carth.* 140.—The case had been argued in the preceding term, (*E. 8 Geo. 3.*) by *Jephson* and *Lee*, Serjeants.

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one, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and, on her death, the trust estate was completely vested in him, (the subsequent limitations in the will being on contingencies which never happened,) and the legal estate descended to him from her. The question is, To whom the whole estate descended on the death of the son? for it did *descend*, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir at law. But, it was contended, that, though he is heir, there is a trust for the paternal heirs; and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust*. When this was mentioned on the trial, I said, as I did the other day in the case of *Doe* v. *Pott* (*a*), that this rule [F] is subject to the qualification, of its being *clearly* the case only of a mere trust, for then, by taking notice of it, the court prevents delay and expence; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said, there might, perhaps, be cases on the subject, and the parties wished to have the opinion of the court. Now, who is to be considered as heir at law on this ejectment? It would be sufficient, for the judgment which I shall deliver, to say, that it is *not a clear case*, that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observations, to show, that it is not only doubtful, but that the inclination of my opinion is, that you cannot support such a trust. A case so circumstanced, in every particular, probably never existed before, and, perhaps, never may happen again. But, cases must often have happened on which the general question would arise; *viz.* [778] Whether, when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed for the different heirs? Consider it, *first*, upon authority; and, *secondly*, upon principle. 1. No case has ever existed where it has been so held; none where the heir at law of one denomination, has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. 2. On principle, it seems to me impossible;

(*a*) *Supra*, p. 721, 722.

[F] That this rule has been long repudiated; see note [F. 1], *supra*, p. 722.

possible; for the moment both meet in the same person, there is an end of the trust. He has the legal interest and all the profits, by his best title. A man cannot be a trustee for himself. Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases, and, if he does not, there is no room for *Chancery* to interpose, and the rule of law must prevail. The case in the *Common Pleas* is an authority, if it went on this ground, and I am told it did. There, the *cestui que trust* taking the legal estate as a purchaser, the descent was altered. *Quâcunque viâ datâ* therefore, the lessor of the plaintiff is entitled. If the question is doubtful, then, in this court, the legal right must prevail; and, if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendants.

WILLES, *Justice*,—I entirely agree with my Lord as to the legal estate, but my doubt is, what is become of the equitable use. Let us see how the facts stand. The money was paid by the father, but he died before any conveyance, devising as stated in the case. Now, what was the ancient use? It was to the heirs *ex parte paternâ*. I do not agree, that there is no difference as to the different heirs. When the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former. After the father's death a conveyance was made to the widow and her heirs, in trust. So, the estate in her was not absolute, but charged with the trust. Suppose the son, in his life-time, had called in the legal estate, and become a purchaser, there is not a doubt, but, in that case, the paternal heirs would have succeeded. There having been no such conveyance to him, the legal estate descended to him from the mother. But I think he took it clothed with the trust, and subject to the ancient use. I do not say he was a trustee for himself, but this ancient use remained uncontrolled, and revived, as between the different heirs, on his death, no act having been done to alter it. If, therefore, the question were to come before me in another court, I should decree a trust in the lessor of the plaintiff. But he certainly is entitled to the legal estate, and that is enough here.

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ASHHURST, *Justice*,—We all agree, that, if there is a doubt as to the trust, the lessor of the plaintiff is entitled to the estate in this court, and, therefore, it is not *necessary* to give any opinion on the other point. But, as it has been moved, I will mention, that I am inclined to be of opinion, that the trust, as well as the legal estate, shall go to the heirs *ex parte paternâ*. To support the contrary position, it must be said, that the son took as trustee for himself and his paternal heirs, for I do not see how the estate shall

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open for the heirs, if he was not himself a trustee. I never knew any case where the court held, when an estate came by descent, that the heir was a trustee, although the ancestor was not. The case in the *Common Pleas* goes a great way to determine this question; for it shews, that, where the trust and legal estates join, they shall both go according to the legal estate.

BULLER, *Justice*,—I am entirely of the same opinion with my Lord, and my brother ASHHURST, on both points. On the first, we are all agreed. As to the second, it is observable, that no case has been cited, nor do I believe any ever existed, where, in a court of equity, an heir of one sort has been determined to hold as trustee for an heir of the other sort. In a court of law, try the question by the principle stated by Mr. *Butt*, *viz.* that, were two titles unite, the party shall be in of the best. What is the better title here? The clear fee-simple estate which descended from the mother. I think there is a mistake in taking the heirs on either side into consideration. They had no interest during the life of the ancestor; the whole was in him. The only person to be considered is the ancestor, who was seised in fee both of the legal and equitable estate. A case has been put, which does not in my opinion vary the question, *viz.* the case of the son's having called for a conveyance. However, as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heirs would have been entitled, but, as he took it by descent from his mother, (and the case would have been the same if we [780] suppose her to have lived beyond his age of twenty-one, and that he never called for a conveyance,) I think the trust was merged and gone.

The *Postea* to be delivered to the plaintiff [† 166].

[† 166] *Vide Price* v. *Langford*, *B. R. E.* 2 *W.* & *M.* 1 *Show.* 92. 1 *Salk.* 337. *Cruise Essay on Fines* 47, 48.

Monday, 2d July.

CLEGG and Another *against* MOLYNEUX and Another.

On trespass for breaking the plaintiff's close, and digging the soil upon the place in which, &c. and taking and carrying away the same, if the defendant plead not guilty, and a verdict is found for the plaintiff, but with damages under 40*s.* and the Judge does not certify, the plaintiff shall have no more costs than damages.

IN *Michaelmas Term*, 21 *Geo.* 3. on *Monday*, the 13th of *November*, *Walker*, Serjeant, obtained a rule to shew cause, why the Master's *allocatur* of the costs taxed for the plaintiffs

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plaintiffs in this action should not be vacated, and why he should not tax the defendants their costs on the *Postea*.

The case had been argued in the beginning of last *Hilary Term*, but I was not in court. It then stood over till this day, it being understood, that there was, for some time a difference of opinion among the Judges.

Lord MANSFIELD now stated the case, and delivered the unanimous opinion of the court, to the following effect.

Lord MANSFIELD,—This is an action of trespass *quare clausum fregit*. The first count states, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet, in walking, trod down, spoiled and consumed, and dug up, and got, divers large quantities of turf, peat, sods, heath, stones, soil, and earth, of the plaintiffs, in and upon the place in which, &c. *and* took and *carried away* the same, and converted and disposed of the same to their own use. There is another count, upon a similar trespass, in another close. The defendants have pleaded the general issue to *the whole declaration*, and two special pleas to the *second* count; and, on the trial, a verdict has been found for the plaintiffs, on the general issue, with 1*s*. damages, and for the defendants, on the special pleas; and the Judge has not certified. The question, on this record, is, Whether the plaintiffs are intitled to any more costs than damages under the statute of 22 & 23 *Car*. 2. *c*. 9. § 136 *(a)*? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the Reports; and, as the question is a general one, [781] we thought it proper to consult all the Judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode, a qualification, of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and, on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which, therefore, is not within the act. Thus, after trees are cut down, and, thereby, severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question. Here it might.

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(a) Or *st*. 2. *c*. 5. § 149.

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The rule made absolute as to vacating the *allocatur* of the plaintiffs costs [† 167].

[† 167] *Vide Cockerell* v. *Allanson*, B. R. T. 22 *Geo.* 3. ☞ *Cotterill* v. *Tolly*, *B. R. E.* 27 *Geo.* 3. 1 *Term. Rep.* 655, 656 [F].

Monday, 2d July.

BERMON *against* WOODBRIDGE.

An insurance on a ship and goods, at and from *A.* to *B.*, during her stay and trade there, at and from thence to her port or ports of discharge in *C.* and at and from thence back to *A.*,—is an *entire* contract, and, if the loss happen at any time after the commencement of the risk, there shall be no return of *premium*.

ON the first day of this term, *Lee* obtained a rule to shew cause, why there should not be a new trial in this cause, which had come on before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Easter Term*, when the jury found a verdict for the defendant.

The case was this: It was an action on a policy of insurance, on the [F 1] *French* ship *Le Pactole*, and her cargo, and the voyage was described in the policy in the following words:—" *At and from* Honfleur, *to the coast of* Angola, " *during her stay and trade there, at and from thence to her* " *port or ports of discharge in* St. Domingo, *and at and* " *from* St. Domingo *back to* Honfleur."—The clause respecting the *premium* was as follows:—" Slaves valued at " 800 *liv. tournois per* head; the ship at £1450 sterling: " other goods, *&c.* as interest may appear; at a *premium* " of £11 *per cent.*"—The ship sailed to *Angola*, and, from thence, after staying some time there, to the *West Indies*. On her way from *Angola*, she put in at *Cayenne* on the coast of *America*, and from *Cayenne* went to *Martinico*, confessedly out of the course to *St. Domingo*. [782] The only witness called by the counsel for the plaintiff, was the captain. He swore, that, in pursuing the direct course from *Angola* to *St. Domingo*, he must have *passed* close to *Cayenne*, but that his *putting in* there was unpremeditated, and from necessity

[F] There is a report of the former case in *Hullock on Costs*, p. 86, and a short notice of it in *Bull. N. P.* p. 330, which is not quite correct: the decision in the case appears properly to have been, that where there is a plea of a right of way in certainty, by metes and bounds, a replication, *extra viam*, rejoinder not guilty, and verdict thereon, and on the general issue to the declaration, and damages given under 40s. there shall be no more costs than damages. Otherwise where the plea is a right of way generally. In *Cotterill* v. *Tolly*, which was assault and battery, where the same count charged a beating and tearing the plaintiff's clothes, and the jury found that the clothes were torn in consequence of the beating, and the damages were under 40s.; it was held, on the authority of this case, that the plaintiff was entitled to no more costs than damages.

[F 1] This case has been mentioned as an authority (*sub silentio*) for an insurance upon enemy's property. That such insurance is illegal, see cases cited in the note to *Planché* v. *Fletcher*, *suprà*, 253, *a*.

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celerity: that his bow-sprit was broken on the passage from *Angola* towards that place, by the violence of the weather: his provisions, too, had run short, although he had been originally fully victualled, owing to an unusual and unexpected delay in watering on the coast of *Angola*, and because his voyage towards *Cayenne* had been protracted by the accident which had happened to his bow-sprit: that the loss of time in watering arose from his being deprived of the assistance of the crews of the *English* vessels, an accommodation which is constantly given in time of peace, and which it had not been foreseen that he would be deprived of, as the hostilities between the two nations had not taken place till after his departure from *France*: that, when he left *Angola*, he thought he had sufficient provisions for the *St. Domingo* voyage; for, notwithstanding the delay there, he had enough to last six weeks, which was more than the usual length of that voyage, though it sometimes lasts three months: that some of his water-casks were staved on the way from *Angola*: that, when he left *Angola*, he did not mean to put in any where between that and *St. Domingo*: that when he was at *Cayenne*, he found it necessary to proceed from thence to *Martinico*, in order to get a supply of provisions there, and that he might avoid the *English* privateers, which were very numerous in the course of the direct passage to *St. Domingo*: that he meant to have pursued his voyage from *Martinico* to *St. Domingo*, in order to take in his homeward-bound cargo of sugars there, according to his original destination; but, that, after he had been there a few days, an embargo was laid on, and continued for seven months, so that it became necessary for him to part with his cargo of negroes at that island, (which he did for a price of £9000 sterling under what they would have fetched at *St. Domingo*,) and that he was obliged to take sugars in payment, no money, or good bills, being to be had: that, after the embargo was taken off, he sailed with the convoy for *St. Domingo*, but not to *St. Louis*, his intended port of discharge, but to *Cape François*, a port in another part of the island, such being the general orders for the convoy: that, at the end of four days, his ship being a slow sailer, he lost sight of the convoy, but still persisted for some time in sailing towards *Cape François*; till his officers represented to him, in the most urgent manner, the danger of pursuing that course any further, on account of the swarms of privateers, which would unavoidably fill those seas, as soon as it should be known that the convoy was gone by: that, on these representations, he determined to alter his course, and strike into the direct way to *Honfleur*, which he accordingly did, and was sailing towards that port when he was taken. To corroborate the testimony of the captain, besides reading his protest, which was to the same effect with his evidence, a certificate

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from the directors of the colony of *Cayenne* and *French Guiana* was offered to be produced, stating the motives which had induced him to put into that port. Lord MANSFIELD was clear, that this was not admissible evidence for the plaintiff; but, having desired to look at it, and having himself read it, he said, as it had been offered on the part of the plaintiff, it might be read as evidence against him, and it was accordingly read, and was in these words:—"We attest, that the "said captain touched here *for want of water*, and that it "was not possible for him to find, in this colony, provisions "to be purchased, of which he was much in want."—This certificate, which must be taken to have been found on the captain's own account at *Cayenne*, his Lordship thought inconsistent with his evidence, because it made no mention whatever of his bow-sprit having been broken. The defendant called no witnesses; and Lord MANSFIELD left it to the jury, to consider whether the deviation in the voyage from *Angola* to *St. Domingo*, by putting into *Cayenne* and going to *Martinico*, was wilful or necessary. They were clearly of opinion, that it was not necessary. Upon their declaring that opinion, as there was a count in the declaration for money had and received, the counsel for the plaintiff contended, that the voyage insured ought to be considered as composed of three distinct parts, or voyages; *viz.* 1. From *Honfleur* to *Angola*; 2. From *Angola* to *St. Domingo*; 3. From *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the *premium* ought to be apportioned, and a return made of that part which was paid to insure the risk from *St. Domingo* to *Honfleur*. Lord MANSFIELD took the opinion of the jury also upon that point, and they were clear there ought to be no return. Next day, however, [784] his Lordship said, he had turned that question in his mind, and entertained some doubts upon it, and, as it was a question of law, desired *Lee* to move for a new trial upon that ground. The motion was made on both grounds, *viz.* 1. On the question of fact, whether the deviation was wilful; 2. On the question of law, whether, supposing it wilful, there ought to be a return of *premium*.

On *Saturday*, the 30th of *June*, the case was argued, by *Lee*, *Howorth*, and *Douglas*, for the plaintiff; and the *Attorney-General*, *Dunning*, and *Bower*, for the defendant.

In support of the verdict, it was insisted, 1. On the first point, that the certificate produced, entirely discredited the captain; and that it was manifest he must have sailed from *Angola* with *the intent* of going to try the market at *Martinico*; for it could not be believed, that he had set sail on a voyage which might last, according to his own account, for three months, with provisions only for six weeks: That this was a mere question of fact and credit, and properly left to the

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the jury, and their judgment upon it ought to be conclusive. 2. On the second point, it was contended, that the description in the policy was of one entire voyage, and one entire risk, and that, in such cases, no return is ever to be made after the risk has once commenced. That this had been decided in a variety of cases, but, particularly, in *Tyrie* v. *Fletcher (a)* [† 168], and *Loraine* v. *Thomlinson (b)*.—In *Tyrie* v. *Fletcher*, the policy was upon the ship the *Isabella*, "At and from *London* " to any port or place, where or whatsoever, *for twelve* " *months*, from the 19th of *August*, 1776, to the 19th of " *August*, 1777, both days included, valued at £1000, for ac- " count of *A. B.* the master, and others that may be con- " cerned with him, at £9 *per cent.* warranted free from cap- " tures and seizures by the *Americans*, and the consequences " of any attempts thereof." The ship was taken by an *American* privateer, on the 13th of *October*, 1776, and the plaintiff brought his action for a return of *premium*, in the proportion of ten-twelfths of the whole, the risk having ceased before the expiration of the second of the twelve months. The cause was tried before Lord MANSFIELD, at *Guildhall*, and a verdict found, by consent, for the plaintiff, in order to take the opinion of the court, whether there ought to be an apportionment and return of *premium*; if there ought not, a nonsuit to be entered. The case was solemnly argued, and the cases of *Stevenson* v. *Snow (c)*, and *Bond* v. *Nutt (d)*, relied on, by the counsel for the plaintiff. But the court were clearly of opinion, that there ought to be no return; that the case was similar to an insurance upon a life for a year, with an exception of death by suicide, where, if the life insured is put an end to by suicide within the year, there never is any return of *premium*; that the contract was entire, and, when so, whether for a specified time, or for a voyage, there shall be no apportionment nor return, if the risk has once commenced; and that the opinion of the court, in *Stevenson* v. *Snow*, and *Bond* v. *Nutt*, went upon there being two distinct risks [1], which there certainly were in those cases, but not in this. In the present case, if the parties had chosen to do so, they *might* have made three insurances in one policy, by dividing the voyage into three distinct parts and risks. There is no long voyage where that *may* not be done. But this contract is

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(a) *B. R. E.* 17 *Geo.* 3.
[† 168] Since reported, *Cowp.* 666.
(b) *H.* 21 *Geo.* 3. *supra*, p. 583.
(c) *B. R. M.* 2 *Geo.* 3. 3 *Burr.* 1237. 1 *Blackst.* 315. 318.
(d) *B. R. E.* 17 *Geo.* 3. *supra*, p. 367. *Note*, *col.* 1.
[1] In *Bond* v. *Nutt*, the reasoning of the court went upon there being a divisible risk, or two risks united in the same policy; but I believe no question was agitated in court about a return of *premium*; for the defendant, in that case, had tendered the *whole premium*, and it was taken out of court by the plaintiff before the trial.

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is not so. It is on a voyage from *Honfleur* back to the same port, by *Angola* and *St. Domingo*. Many of the policies on our *East India* voyages run in the same way, and there is never any return of *premium* on them, in whatever part of the voyage the loss happens. The difficulty of apportioning the *premium* is insurmountable. The risk varies every day, and hour, in time of war; and it is impossible to ascertain how much shall be appropriated to each different part. The *premium* is mentioned in the gross—£11 *per cent.*—on the whole voyage; not in separate distinct sums for different parts of it.—*Dunning* said, he had advised the action in the case of *Tyrie* v. *Fletcher*, having then an idea, that *Stevenson* v. *Snow* had been decided on the broad ground, that there should be a return in all cases where the risk could be ascertained to have ceased before the end of the voyage insured; but that, on the argument of *Tyrie* v. *Fletcher*, it came out, clearly, that the judgment in *Stevenson* v. *Snow* had gone upon the ground of there being two voyages.

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For the plaintiff, it was contended, 1. That the certificate produced was not at all inconsistent, or incompatible, with the captain's evidence. It did not follow, because the reason of want of water was there stated for his putting into *Cayenne*, that he had not also other reasons for adopting that measure. The captain alone was examined. He spoke to facts and motives within his own knowledge: and the jury could not disbelieve him, without imputing perjury to him, which they had no right to do in a case where there was no incongruity in his evidence and he was not contradicted, nor his credit impeached, by any other witness. The verdict was founded in part upon his evidence; for, as he was the only witness on either side, the fact of the supposed deviation could only be gathered from what he swore; and, if one part of his testimony was to be adopted, the whole ought. If an affidavit, or an answer in *Chancery*, is read in evidence, it cannot be mutilated, and part received and part rejected; but the whole must be taken together. 2. As to the return of *premium*, it is certainly most reasonable, that there should be nothing paid for that part of a voyage, in which no risk is run by the underwriter. This seems to follow from the very nature of a contract of mere indemnity, which a policy of insurance is; and, in *Stevenson* v. *Snow*, the determination went upon that general principle, not merely on there being two voyages. The cases of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinson*, were upon time; and, in such cases, the reason why there shall be no return, is, that, from the nature of the thing, it is impossible to ascertain the degree of risk in the different portions of the time insured. But, where the insurance is upon a voyage, consisting of different parts, from port to port, there is nothing so easy, because the respective

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spective *premiums* for the voyage between all the different ports mentioned in the policy are always known and settled. If there were any thing in the supposed difficulty of apportioning the *premium* in time of war, it ought to be considered, that the war had not commenced when this contract was entered into. But, if it were necessary for the plaintiff to shew, that, by the very words of the policy, there were three different voyages insured, surely they are distinctly marked out here, as the two were in *Stevenson* v. *Snow*. The words "*at and from*," are repeated three times, which would have been unnecessary, if one entire voyage, and one entire contract, had been in contemplation. In short, the form of expression here is fully as descriptive of several successive voyages, as the words of the policy were in *Stevenson* v. *Snow*, and indeed much more so, if they were as stated in Mr. *Justice* BLACKSTONE's report of the case; for, according to him, the words of that policy run, "*Warranted to* "*depart with convoy for the voyage* (a)," not as stated by Sir *James Burrow*, "*Warranted to depart with convoy* "*from* Portsmouth *for the voyage* (b)." In all cases where there is an insurance on an outward-bound voyage, and also on the homeward-bound voyage from the ultimate port at which the homeward-bound cargo is to be taken in, though in the same policy, the division into two voyages, and two risks, is obvious and natural; insomuch that, by the *French* ordinance of 1681, which is, in some measure, a digest of the general law of merchants relative to maritime causes, it is expressly provided, that a fixed proportion of the *premium* shall be returned, if the homeward-bound voyage never commence. "*Si l'assurance est faite sur marchandizes pour* "*l'aller & le retour, et que le vaisseau, étant au lieu de sa* "*destination, il ne se fasse point de retour, l'assureur sera* "*tenu de rendre le tiers de la prime, s'il n'y a stipulation* "*contraire* (c)." There, too, the words, "*assurance pour l'aller* "*& le retour*," are much less expressive of a divisible risk, than those used in the present policy.—*Lee* mentioned a case of *Scott & others* v. *Rae*, tried before Lord MANSFIELD, at *Guildhall*, as directly in point. The insurance there, was, "at and from *Grenada* to *Boston*, in *New England*, and "from thence back to *Grenada* and *London*." The ship sailed from *Grenada* to *Boston*, and from thence to *Goldsborough*, in *New England*, and from *Goldsborough*, directly to *London*, and Lord MANSFIELD held, that the contract was capable of being severed, that there ought to be a return of *premium* proportioned to the risk from *Goldsborough* back to *Grenada*, and from thence to *London*, and that this proportion might

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(a) 1 *Blackst.* 316.
(b) 3 *Burr.* 1237.
(c) *Ordonn. de la Mar.* 1681. *Art.* 6.

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might be ascertained, and had been proved by a witness to amount to £3 *per cent.* [1].—*Howorth* stated, that in the case of * *Lavabre* v. *Walter* (*a*), the under-writers were so well satisfied that the risk might be apportioned, that they had voluntarily made a return of *premium*.

Lord MANSFIELD said, the reason why he had desired the motion to be made on the point concerning the return of *premium*, and why he should now direct that the case should stand over till the court should consider of their opinion, was, that, in all mercantile transactions, it is infinitely more important that the law should be certain and uniform, than that, at first, it should be one way or the other.

This day, his Lordship delivered the opinion of the court, to the following effect:

Lord MANSFIELD,—The motion for a new trial in this case, is made upon two grounds: 1. That the verdict is against evidence: 2. That there ought to be a return of *premium* for the voyage from *St. Domingo* to *Honfleur*.—1. There was but one witness examined,—the captain,—and he did give evidence, that he was forced to go into *Cayenne* and *Martinico* on account of the breaking of his bow-sprit, and the deficiency of provisions, and averred, that the whole was occasioned by inevitable necessity. If this was true, there was no deviation in point of law; but there were many suspicious circumstances in his evidence; and the jury expressly found, on the specific question being put to them, that his going out of the direct course was wilful, not necessary. They thought, that, when he sailed from *Angola*, he did not intend to go to *St. Domingo*, but meant to try the *Martinico* market. It is said, that, as the case rests entirely on his evidence, you must take it altogether, and believe the whole; but though the whole of an *affidavit*, or answer, must be *read*, if any part is, yet you need not *believe* all equally. You may believe what makes against his point who swears, without believing what makes for it. It was an extraordinary circumstance, that the ship should be so soon in want of water, and a very suspicious one, that she should fall short of provisions. How came the captain to set out on such a voyage so scantily provided? Then, there was a piece of evidence, which, though not

[1] Nobody at the bar recollected this case. *Lee* cited what Lord *Mansfield* said, from a note taken on the back of the brief at *Guildhall*, by Mr. *Thoresby*, who was attorney for one of the parties, and who has favoured me with the perusal of the brief, from which, it appears, that there was a warranty in the policy, that the ship should depart *from Grenada for London*, on or before the 1st of *August*, 1772; so that according to the *original* contract, and independant of the agreements mentioned *infra*, p. 790, there were two risks, *viz.* one absolute, from *Grenada* to *Boston* and back to *Grenada*, and another conditional, *viz.* from *Grenada* to *London*, in like manner as in the case of *Bond* v. *Nutt*.

(*a*) *M.* 20 *Geo.* 3. *supra*, p. 284.

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not admissible *for* the plaintiff, was very strong *against* him. That was the certificate, which was obtained out of the regular course of business, and manifestly intended to be a justification; and yet mentions nothing of the loss of the bowsprit, which the captain stated, on his examination, as his principal reason for going to *Cayenne*. There are also other strong circumstances. But, if this point was doubtful, who but the jury were to decide upon it? No new evidence is pretended. It is not pretended, that the plaintiff has any of the crew to produce, to explain, or corroborate, the captain's testimony. If we were to grant a new trial, on the ground of the verdict being against evidence, it would be sending the cause back to a jury, with an intimation that they ought to believe the captain. We are all, therefore, against granting a new trial on this ground. 2. If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases, (though my opinion has fluctuated,) we are, now, all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking "*at*" and "*from*" separately, it will make six; *viz.* 1. At *Honfleur*, 2. From *Honfleur* to *Angola*; 3. At *Angola*, *&c.* The principles are clear. Where the risk has never begun, there must be a return of *premium*; and, if the voyages, in this case, are distinct, the risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the *premium*. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed, in twenty-four hours, there shall be no return. The case is the same, if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the *premium* as an entire sum for the whole, without division: It is estimated on the whole at 11 *per cent*. And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the under writers would have been liable though she had not been so at *Angola*, *&c.*; but, according to the construction

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contended for on the part of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also *when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson* v. *Snow*, and *Bond* v. *Nutt*, were quite different from this. They depended upon this; that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson* v. *Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth* whether there should be an insurance from that place. This necessarily divided the risk [F 2], and made two voyages. In *Bond* v. *Nutt*, it was held, that there were two risks, upon the same principle. "*At Jamaica*," was one. The other, *viz.* the risk "*from Jamaica*," depended on the contingency of the ship having sailed *on or before the first of August*: *That* was a condition precedent to the insurance on the voyage *from Jamaica* to *London*. The two cases of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinson*, are very strong, for, if you could apportion the *premium* in any case, it would be in insurances on time. Therefore, on very full consideration, we think this one entire risk; one voyage; and that there can be no return of *premium*.

The rule discharged [† 169].

After Lord MANSFIELD had delivered the opinion of the court, as above, he said he had forgot to mention the case of *Scott* v. *Rae*; that he had no recollection of it, but that it appeared from the brief, which *Lee* had brought into court, that there had been a new agreement with the underwriters, that the ship might go to *Goldsborough*: that he must have looked upon that as a new voyage. *Lee* took notice, that there were two agreements; one, that the ship should load at

[† 169] *Vide Plantamour* v. *Staples*, *B. R. M.* 22 *Geo.* 3.

[F 2] See *acc.* *Rothwel* v. *Cooke*, 1 *B.* and *P.* 172, *cit. supra*, 588. In *Meyer* v. *Gregson*, *B. R. E.* 24 *G.* 3. *Marshall*, *Ins.* 678; *Park*, *Ins.* 389. Upon an insurance *at and from Jamaica*, with warranty to sail on or before the 1st of *August*; the ship did not sail till *September*, and was lost; and it was held there, (in the absence of evidence of usage,) that it was only one risk, and one premium, and that nothing could be recovered by the assured for the risk *from Jamaica*. But in *Gale* v. *Machell*, *B. R. E.* 25 *G.* 3. *Marshall*, 659, *Park*, 390, and *Long* v. *Allan*, *B. R. E.* 25 *G.* 3. *Marsh*, 660, *Park*, 390, where there was evidence of usage to estimate the risk *at Jamaica* separately from the risk on the voyage *from Jamaica*, and (in case of the insurance on the voyage being discharged) to return the premium, deducting a certain sum for the separate risk at *Jamaica*; the court held the assured intitled to recover the balance which remained as premium for the voyage, according to the usage proved.

at *Goldsborough*, to which the defendant had acceded; another, that she should come directly from that port to *London* without returning to *Grenada*, to which the defendant had not acceded; but Lord MANSFIELD said, the first agreement was sufficient to support the determination.

The KING *against* GOUGH.

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Tuesday, 3d July.

Perjury being committed at the booth-hall, *within the limits of the city of Gloucester*, which is a county in itself, on the trial of a cause before a jury of the county *at large*; the indictment may be found and tried by juries of the county at large.—The King cannot, by charter, authorize the trial of crimes out of the county where they were committed.—A new trial *may* be granted at any time before judgment.

THE defendant was tried before PERRYN, *Baron*, at the Spring Assizes, in 1777, at *Gloucester*, on an indictment for perjury. The indictment was found by the grand jury for the *county of Gloucester*. It stated, that on the trial of an action brought in the *King's Bench*, in which the *venue* was in the *county of Gloucester*, between Lord *Ducie* and Doctor *Bosworth*, at the assizes holden at *Gloucester*, for the said *county of Gloucester*, the defendant was produced as a witness, and falsely, wilfully, corruptly, and maliciously, did, among other things, depose in substance, as follows, &c. whereas in truth, &c. and so the jurors, aforesaid, &c. say that the defendant, &c. at the said assizes held at the *said city of Gloucester*, in his evidence, committed false, wilful, and corrupt perjury. Then another act of perjury was laid on the same occasion, and at the same time and *place*. The record then stated, after the appearance of the defendant, and a plea of not guilty, that the sheriff of the *said county of Gloucester* was commanded to summon a jury of the said county of *Gloucester*, for the next assizes and general session of oyer and terminer to be holden for the said county of *Gloucester*, and that, thereupon, such proceedings were had, that, at the assizes and general session of oyer and terminer holden at *Gloucester*, for the *said county of Gloucester*, on the 12th of *March*, 17 *Geo*. 3. a jury impannelled and returned by the sheriff of the said county of *Gloucester*, was chosen, tried, and sworn to try the prisoner.

Upon the trial, a *special verdict* was found, which stated: 1. A charter to the burgesses of *Gloucester* in the first year of *Ric*. 3. whereby that King granted to them, and their successors, that the town of *Gloucester* should be "*unus integer comitatus per se corporatus, distinctus, et penitus separatus, a dicto comitatu* Gloucestriensi, *in perpetuum, et non parcellum ipsius comitatûs* Gloucestriensis: *et quod idem comitatus sic corporatus, et a dicto comitatu* Gloucestriensi *distinctus et separatus, comitatus ville* Gloucestrie *pro perpetuo nominetur*; salvis tamen et reservatis nobis, et hæredibus nostris, quod justitiarij ad assizas in comitatu *Gloucestriensi*

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capiendas assignandi, justitiarij ad goalam in comitatu *Gloucestriensi* liberandum assignandi, nec non justitiarij ad pacem in dicto comitatu *Gloucestriensi* conservandam assignandi, in tenendas sessiones suas, ac etiam vicecomites comitatûs nostri *Gloucestriensis*, in tenendos comitatus suos, liberè possint, et eorum quilibet possit, *ingredi villam prædictam*, et easdem sessiones et comitatus tenere de quibuscunque rebus et materijs *extra dictum comitatum ville* Gloucestrie *et infra comitatum* Gloucestriensem emergentibus, sicut ante hæc tempora tenere consueverunt, presenti concessione nostrâ in aliquo non obstante." The charter then declared, that the bailiffs of the town of *Gloucester* should be sheriffs of the county of the town; that they should hold county courts from month to month; that they should exercise all the same powers, *&c.* belonging to the office of sheriff, within the limits of the town, as other sheriffs exercise in their bailiwicks; that all writs, *&c.* which would have been directed to the sheriff of the county, if the town had not been made a county in itself, should be directed to them; and that no other sheriff or his bailiffs should enter the town to do any thing belonging to the office of a sheriff, except the sheriff of the county of *Gloucester* to hold his county courts as aforesaid: 2. That this charter had been accepted: 3. That it had been confirmed by a charter of 5 *Hen.* 7. *and declared to be by authority of parliament:* 4. A charter in the 33d year of *Hen.* 8. under the privy seal, and *declared to be by the authority of parliament,* whereby *Hen.* 8. incorporated the burgesses of *Gloucester,* by the name of the mayor and burgesses of the *city* of *Gloucester,* and city of the county of *Gloucester,* and made it a city, and confirmed to the said city the former grants, making it a county in itself: 5. That this charter was accepted: 6. A charter in the 24th year of *Car.* 2. confirming all former privileges contained in prior charters which had been surrendered; and containing a clause in effect the same, and nearly in the same words, with that above set forth from the charter of *Ric.* 3.: 7. That this charter of *Car.* 2. was accepted: 8. That, during all the time aforesaid, commissions of *Nisi Prius,* assize, oyer and terminer, and general gaol-delivery, had been, from time to time, granted to divers justices, to hear and determine, try and adjudge upon, the several matters and things to such commissions belonging, and arising in *the said city of Gloucester,* and to deliver the gaols of the said city; and that other, and separate, commissions, of the same sort, had, from time to time, during all the time aforesaid, been granted to divers justices, to try and determine, *&c.* upon the several matters and things to such last-mentioned commissions belonging, and arising in *the said county of Gloucester,* and to deliver the gaols of the said county: 9. That the commissions both for the city and the

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county, had been executed *at a place in the said city of Gloucester*, called the *Booth-hall*: 10. That, during all the time aforesaid, *the jurors for the city* had enquired and made presentment of such matters and things belonging and given in charge to the jurors for the city, and arising in the said city of *Gloucester* in the said place called the *Booth-hall*, and that such matters and things so presented by the said jurors, when tried, had been tried by a jury of the said *city* of *Gloucester*: 11. That the grand and petty juries for the *county* had exercised the same jurisdiction as to matters arising within the county: 12. That, during all the time aforesaid, the sessions of the peace for the *county* had been held in the *Booth-hall*: 13. That the issue in the indictment mentioned had been tried by a jury of the *county* in the *Booth-hall*: 14. That the defendant, being then and there sworn, did upon his oath, in the said place called the *Booth-hall*, commit wilful and corrupt perjury, in the several matters charged in the indictment.

The objection to this indictment was, that the offence had been committed within the *county of the city*, and that the juries of the county at large had no jurisdiction to find or try an indictment for any crime not committed in the *county at large*.

It came on to be argued, on *Wednesday*, the 23d of *May*, by *Bearcroft*, for the prosecution, and *Baldwin*, for the defendant.

The court directed *Baldwin* to begin.

He said, the general position was clear, that offenders can only be indicted and tried by juries of that county in which the offence was committed. This nicety was formerly carried so far, that, till the statute of *Edw*. 6. (a), if a person received a mortal wound in one county, and died in another, the crime could not be tried in either; 2 *Hale's P. C. Cr.* 163. 2 *Hawk*. 220. § 34, 35, 36. 4 *Blackst. Comm.* 303. *Stedman's Case, Cro. El.* 137. *Richard Thomas's Case, ibid.* (in which, the indictment being, that the defendant at the castle of *Lincoln* falsely deposed, without shewing in what county, he was discharged,) & 1 *Salk*. 288. Such being the general principle, the counsel for the prosecutor must endeavour to distinguish this case, by some of the clauses in the charters found by the special verdict. They will probably rely on the clause in the charter of *Ric*. 3. But, by that clause, the justices for the county at large are only authorised to enter into the town, and to enquire of things there which had arisen out of the county of the town. The true meaning of this charter was, to give the use of the *Booth-hall* to the Judges and juries for the county at large, and to authorise their proceedings there, relative to matters within their jurisdiction. At

(a) 2 & 3 *Edw*. 6. c. 24. *Vide* 1 *Hawk. Pl. Cr. c.* 31. § 13.

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At the *Old Bailey*, which is within the city of *London*, juries, for the county of *Middlesex* sit to try offences committed in that county; but, when perjury has been committed there on a trial before a *Middlesex* jury, such perjury is never tried by a jury of the county of *Middlesex*, but by one of the city of *London*. In the celebrated case of *Elizabeth Canning*, after a prosecution at the *Old Bailey* for a crime committed in *Middlesex*, the indictment of the witnesses for perjury was laid in the city. In like manner, on a trial at bar in *Westminster-hall* from *Yorkshire* for example, though the cause is tried by a *Yorkshire* jury, if perjury be committed by a witness, he must be indicted and tried by a *Middlesex* jury. In 2 *Hawk. c.* 5. § 19. where this case of *Gloucester* is mentioned, and in the authorities there cited, all that is meant is, that juries of the county sitting in the city may find and try offences committed in the county. The case in *Popham* 16. (also reported in *Anderson* 291.) which will probably be mentioned on the other side, seems to be in favour of the defendant, for *the decision* only was, that the justices of assize and gaol-delivery might sit in the city for things which happened within the county; and, in a note at the end of the case, it is said, that, by the commission for the county, a thing which happens in the town cannot be determined, albeit it be felony committed in the hall during the sessions *(a)*. [795] Considerable pains have been taken to enquire if there is any precedent, or instance, in the city of *Gloucester*, like the present case, and none has been found. No inconvenience will arise, if the court should hold, that this indictment cannot be supported, because the verdict states, that there are grand juries in the city, who may find offences committed in the *Booth-hall*.

Bearcroft, for the prosecution, argued, that the perjury having been committed on the trial of a county cause, it must of necessity be taken, that, at the time, the spot where the offence took place was part of the county at large. It is no uncommon thing for the same spot to be considered, for different purposes, as being within different jurisdictions. The space between the high and low-water marks, when dry, is within the jurisdiction of the sheriff, but when it is overflowed, the sheriff and Admiralty have *divisum imperium* over it [1]. Before the charter of *Ric.* 3. this spot was clearly part of the county at large. By the statute of 6 *Ric.* 2. *c.* 5. the justices of assize and gaol-delivery are to sit in the county towns of the different counties; by 13 *Edw.* I. c. 30. trials at *Nisi Prius* are to be held before the Judges of Assize; and the authority of the Judge at *Nisi Prius* is by the commission of Assize, as is laid down by Lord

(a) Poph. 17.

[1] *Vide* 5 *Co.* 107.

HOLT, *Salk.* 454 [† 170]. By giving authority to the Justices for the county at large, to try county causes within the limits of the town, the charter of *Ric.* 3. made the place where they sat part of the county at large for that purpose. The trial on which the perjury was committed was at *Nisi Prius*. The whole proceedings were void, unless the *Booth-hall* be considered as being, at that time, part of the county. All the Judges in Queen *Elizabeth*'s time, in the case reported by *Popham*, agreed, that they might sit in the city for county causes, and that the King might, in making a separate county, save and except part of the jurisdiction within it which the county from which it was taken had in it before. By the saving in the charter of *Ric.* 3. all that appertains to, and is connected with, the execution of commissions for the county is necessarily saved. It is true, that a felony committed in the hall during the assizes for the county, must be tried in the city, because such offence is entirely unconnected with the execution of the commissions for the county. [796] The case in *Popham* is more materially reported by *Anderson*, and *he* states, that the Judges were of opinion, that it was the intent of the charter, that the town of *Gloucester* should continue, for the purposes mentioned in the exception, to be part of the county at large. It may be true, that indictments for perjury before *Middlesex* juries, at the *Old Bailey*, are laid and tried in *London*, but no inference can be drawn from thence with regard to *Gloucester*. There may be some particular provisions for that purpose n the charters of *London*, which charters are confirmed by act of parliament. Perhaps the prosecution, in the present case, might be in *either* county. In point of law, the *Booth-hall* was, at the time, in the county at large, and, in point of fact, and local situation, in the county of the city, and, therefore, the offence might be said to have been committed either in the one or other.

Lord MANSFIELD,—It seems to me, as at present advised, to be the better opinion, that the crime might be laid in either county; but the question now before us is, Whether it could be laid in the county at large. The doubt before the Judges, in the case in *Popham*, was as Mr. *Baldwin* states it, (*viz.* whether the Judges could sit in the city to try matters arising in the county at large.) But it is material to see how it was solved. In the time of *Ric.* 3. the town was part of the county at large. By his charter it was made a distinct county, but with an exception, that the Judges for the county at large might still try causes there. The King cannot by his charter give Judges a power to try in one county offences committed in another. That was admitted in the case before the Judges as reported by *Anderson*. But, it was answered, that he had continued the city as part

[† 170] 3 *Blackst. Comm.* 60.

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of the county at large. If this is so, the cause in which the perjury was committed, was tried in the county at large, and the witness was examined, and the crime committed in the county at large. This distinguishes the present case from that of the *Old Bailey*, which struck me strongly at first. The city of *London* has many charters and customs confirmed by act of parliament, and the custom of trying offences committed in *Middlesex*, at the *Old Bailey*, has probably been confirmed by act of parliament; for otherwise it would be void.

[797]

Willes, *Justice*,—If it had not been for the case of the *Old Bailey*, I should have had no doubt; but, with regard to that, there is no occasion to suppose a grant or custom confirmed by act of parliament, because the whole court seems to think, that the indictment may be laid either way, and, at the *Old Bailey*, the usage has been, to lay the indictment in the city.

Ashhurst, *Justice*,—No argument can be drawn from the practice at the *Old Bailey*, unless we knew more exactly how the case stands; there may be an act of parliament enabling the Judges to try matters there, which arise in the county of *Middlesex*. Here, I think, the indictment would have been good either way. The King cannot, without an act of parliament, give the Judges a power to try in one county, facts arising in another. Therefore, the meaning of the charter must have been to continue the town as part of the county at large for the purpose of trying county causes.

Buller, *Justice*,—I am of the same opinion. There is no way of supporting the judicial proceedings at *Gloucester*, from the time of *Ric.* 3. but by considering them as having been had in the county at large; because I take the law to be clearly as my Lord and my brothers have stated it. We have no authority to compel a jury to come, or to administer an oath, out of the county where the matter arises. Therefore, the meaning of the charter must have been, to leave the place as part of the county at large. I am very strongly inclined to think the indictment might be laid in either, but, if there is a difference, I think this the most proper way [☞].

The defendant was this day brought up for judgment, when Buller, *Justice*, read the report of the evidence, and *Dunning*, was heard on his behalf; after which, the court observed, that, from the state of the evidence, the conviction appeared extraordinary, and hinted that a new trial would be proper.

[☞] In *Bullock* v. *Barrow*, *B.R.E.* 27 *Geo.* 3. it was objected that the *Booth-hall* was not part of the county for the purpose of executing writs of enquiry. But the court held, that if there was a foundation for the objection, the party had waved it by appearing there.

1781.

The KING against GOUGH.

proper. *Dunning* said, he should have made a motion for that purpose, if he had thought it was competent, after such a long interval of time since the conviction. Upon this, Lord MANSFIELD declared, that it was still competent, because the report of the evidence coming regularly now before the court, if enough appeared to raise an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial, or postpone for ever pronouncing judgment; [798] for that there would be an absurdity in a judgment on a conviction for perjury, where a fine of a shilling should be imposed as the punishment.

A new trial awarded (*a*) [F].

(*a*) *Vide Birt* v. *Barlow*, *E.* 19 *Geo.* 3. *supra*, p. 171.

[F] In *R.* v. *Holt*, 5 *T. R.* 436, and the cases there cited, it appears to be clearly established, that the party cannot claim of right to be heard on motion for a new trial, after the four first days of term; but if, upon the case being brought before the court, on motion in arrest of judgment, or otherwise, the court see reason to believe the defendant has been improperly convicted, they will interpose of themselves, and grant a new trial. So, if the court see a ground for arresting the judgment, they will do so, though the defendant desire to waive any such objection. *R.* v. *Waddington*, 1 *East*, 146.

The End of TRINITY TERM, 21 GEORGE III.

A

TABLE

OF THE

PRINCIPAL MATTERS.

N. B. The letter n., by itself, or followed by a *number,* thus, n. [1], n. [2], *&c.* indicates that the passage referred to is in one of the notes marked with *numerical characters;* n., followed by another letter, thus, n. (*a*), n. (*b*), *&c.* that it is in one of those marked with *letters;* followed by this mark †, thus n. [†], that it is in one of those added in the second Edition; and followed by this mark [☞]; thus n. [☞], that it is in one of those added in this third Edition.

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ALDERMAN.

ALIEN *Enemy.*

ALLEGATION.

ALTERNATIVE.

AMENDMENT.

5. If

† 9. And

33. And

BAR.

☞ BARBADOES.

BARGAIN *and Sale.*

BARON.

BARRISTER.

BASTARD.

COPYHOLD.

CORONER.

CORPORATION.

CORPORATOR.

COSTS.

16. Where

by

4. Distress

ENEMY.

EXCHANGE.

EXCHEQUER *Chamber.*

6. It

EXCISE.

EXCLUSIVE.

EXECUTION.

EXECUTOR.

EXECUTORY.

EXECUTORY *Devise*.

EXEMPTION.

EXTENT.

F

FEE-FARM.

FELON, FELONY.

FEME *Covert*.

FEOFFMENT.

FICTION *of Law*.

FINE.

FINE *on Admission to a Copyhold*.

FISHERY.

4. A *conviction*

INTENDMENT.

INTEREST.

INTEREST

† MAGNA

MURDER.

MUTINY *Act.*

☞ 2. But

5. The

21. And

POWER.

POWER.

† POWYS's *Act.*

PRACTICE.

sign

REQUESTS.

SET-*Off.*

† *Vide* Attorney, No. 5. Bankrupt, No. 10, 34. Costs, No. 12. Plea *Pleaded*, No. 2, 3.

SETTLEMENT.

times

SOLVIT

28\. *cap.*

CHARLES I.

TRIAL.

TROVER.

TRUST, TRUSTEE.

U.

UNDER-LEASE, UNDER-TENANT.

† UNDER-SHERIFF.

V.

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VENIRE *de novo.*

VENUE.

2. When

3. The

the

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